IN THE

SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, 1873.

No. 234.

ILLINOIS CENTRAL R. R. CO., and
THE DUBUQUE & SIOUX CITY R. R. CO.,
Plaintiffs in Error,

vs.

ALFRED W. RICHMOND and JOHN JACKSON,
Defendants in Error.

STATEMENT OF CASE, ASSIGNMENT OF ERRORS, AND BRIEF OF ARGUMENT OF JAMES F. WILSON, FOR PLAINFIFFS IN ERROR.

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vs.

ALFRED W. RICHMOND AND JOHN JACKSON, DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

STATEMENT OF CASE.

This case was brought into this court by a writ of error directed to the Supreme Court of the State of Iowa.

At the December Term, 1872, the defendants in error moved in this court "to dismiss the writ of error on the ground that the 're-

cord does not show a state of facts, that makes any act of Congress apply to this case.'" But the court held that: "The record does show, however, that the present plaintiffs in error claimed in the State court, that contracts made with defendants in error had been rendered void and of no force and effect by provisions of the Constitution of the United States, and of certain acts of Congress approved July 25, 1866, and June 15, 1866, and also that the decision of the Supreme Court of Iowa denied this claim."

The case was a proceeding in equity in the State court. The facts involved and necessary to a proper understanding of the federal question presented by the record, are as follows, viz: On the 22d day of August, 1860, a contract was made between the Dubuque and Sioux City Railroad Company and the Dubuque Elevator in these words: "Said railroad company lease to the Dubuque Elevator, in consideration of the covenants and agreements hereinafter set forth, a piece of ground for the erection of a grain elevator and grain store house, for the term of fifteen years from the date hereof.

"Said land is to be mutually selected by the parties hereto, on the depot grounds of said railroad company in Dubuque, and to be sixty-five feet square or thereabouts, but liable to be increased in case the business of the company warrants it, as hereinafter mentioned.

"The Dubuque Elevator shall have the exclusive possession of said land so long as they comply with the terms of this lease.

"The Dubuque Elevator covenant and agree:

"1st. That they will erect a building suitable for receiving, storing, delivering and handling all grain that shall be received by the cars of said company not otherwise consigned; and that they will, from time to time, make such additions thereto as the amount of the business to be done may require.

"2d. That they will pay the railroad company the yearly rent of five dollars.

"3d. That they will not charge for receiving, storing, delivering and handling grain, higher rates than are charged in the same

business at Chicago, Illinois; but the business shall be conducted upon the same terms as may be charged at Chicago from time to time.

"4th. That at the expiration of fifteen years the Dubuque Elevator will, at the option of said railroad company, accept of and enter into a renewal of this for another fifteen years exactly on the same terms as this lease, or accept in full payment for their buildings, machinery and property necessary for the receiving, storage, delivery and handling of grain, and the conducting of such business, the amount for which the same, by an appraisal, may be ascertained to be worth.

"The Dubuque and Sioux City Railroad Company covenant and agree to maintain the Dubuque Elevator in the peaceable possession of said premises so long as they abide by and perform the covenants of this lease; and further covenant that they will not erect a similar building, namely, a building for the receiving, storing, delivering and handling of grain, in the city of Dubuque; and further covenant that they will not grant or lease to any other party or parties during the lease, the right to erect any such building in Dubuque.

"And it is understood and agreed that this instrument is entered into by said parties in their own behalf and in behalf of their legal representatives, respectively, and binding on them and their legal representatives as fully and effectually as if expressly so written in the covenanting clauses." Record pp. 3, 4.

In January, 1861, another contract was made by the same parties in these words: "The Dubuque Elevator agree to receive and discharge for the Dubuque and Sioux City Railroad Company all through-grain at one cent a bushel, and shall make no charge for storage, unless the grain is in store more than ten days. In case the grain is held in store for the railroad company for more than ten days, the Dubuque Elevator shall have one cent a bushel for the first ten days (or fraction of ten days) following the ten days without charge, and shall have one cent a bushel for every additional ten days or fraction of ten days.

"And the Dubuque and Sioux City Railroad Company agree that the Dubuque Elevator shall have the handling of all through-grain, and agree to pay the Dubuque Elevator one cent a bushel for receiving and discharging thereof as aforesaid; and agree to pay for storage as aforesaid when the same exceeds ten days.—This agreement to continue until the expiration of the contract to which it is supplementary." p. 4.

In 1867 the Illinois Central Railroad Company entered into the following contract with the Dubuque and Sioux City Railroad Company, viz:

"This lease made and entered into upon this the thirteenth day of September, in the year of our Lord one thousand eight hundred and sixty-seven, between the Dubuque and Sioux City Railroad Company of the State of Iowa, of the first part, and the Illinois Central Railroad Company, of Illinois, of the second part, witnesseth:

"That the said party of the first part, for and in consideration of the rents, covenants and agreements hereinafter mentioned, has let and leased, and by these presents does let and lease unto said party of the second part, for and during the term of twenty years, commencing upon the 1st day of October, A. D. 1867, the Dubuque and Sioux City Railroad, including tracks, depots, right of way, bridges, turn-tables, side-tracks, switches, water-tanks, depot grounds, as now occupied, cars, engines, locomotives, warehouses, elevators, and all other things, real or personal, used or to be used in and about the operation of said railway, and every thing pertaining thereto, together with full power to build, maintain and operate the said railway as fully as the said party of the first part can or may do, to have and hold the same unto said party of the second part for and during said term of twenty years. * * * *

"It is further agreed that the party of the second part shall assume the lease made by the party of the first part with the Cedar Falls and Minnesota Railroad Company, a copy of which is hereto appended, marked A. Also the contract made by said

party of the first part with the Dubuque Elevator Company, a copy of which is hereto appended, marked B." pp. 4, 5.

The defendants in error claim to be the owners of the Dubuque Elevator.

The plaintiffs in error own and operate the Illinois Central Railroad, which is situate in the State of Illinois, with its western terminus at Dunleith; and operate under the above lease the Dubuque and Sioux City Railroad, which is situate in the State of Iowa, with its eastern terminus at Dubuque. The two roads are connected by the Dubuque bridge, and being under the same management and control, practically constitute one through-line. Prior to the construction of the said bridge the connection was made by ferry boats, loaded cars being then, as they are now, transferred without any re-handling of freight. The term "through-grain," as used in the contract sued on, means grain consigned to Chicago, or other points east of Dubuque. Large quantities of "through-grain" were shipped over the Dubuque and Sioux City Railroad, and without being delivered to the Elevator for handling, were passed through Dubuque without unloading; and on to destinations in Illinois and beyond, in the same cars into which the grain was originally loaded—there being no handling of such grain between the points of shipment and the places of destination. The cost of transferring grain through the elevator, including wastage, was much greater than by the mode adopted by plaintiffs in error, the difference was accorded to shippers by a reduction of the rates of transportation. *pp.* 38, 39.

The defendants in error claimed that the passage of this grain through Dubuque without delivery to them for handling in their Elevator was a breach of the contract entitling them to handle all through-grain at a compensation of one cent per bushel, and demanded payment to that extent for all such grain. Payment being refused, this suit was brought for the recovery of damages. The claim of the defendants in error was based exclusively on their alleged right to handle and pass through their Elevator all grain shipped in the State of Iowa on the line of the Dubuque

and Sioux City Railroad, and destined for points in Illinois or beyond. The alleged breach of contract was stated in petition of defendants in error in the state Court in these words, viz: "That the defendants are daily receiving through-grain as aforesaid, and are daily passing the same through Dubuque without permitting plaintiffs to have the handling of the same at their elevator as aforesaid, and without paying plaintiffs therefor." p. 13. The plaintiffs in error denied each and every allegation in the petition, and averred that defendants in error had been paid in full for all of the grain which they were entitled to handle under and by virtue of said contract, and so far as the through-grain was concerned, (which is the only subject matter in controversy here) relied at the final hearing in the state Court on the propositions that the parts of the contract sued on were in conflict with the section of the Constitution of the United States which confers on Congress the power to regulate commerce among the States; with the act of June 15, 1866, entitled "an act to facilitate commercial, postal and military communication among the several States;" and with the act of July 25, 1866, entitled "an act to authorize the construction of certain bridges and to establish them as post-roads;" and that the said parts of said contract were void because they are in contravention of the public commercial policy of the country as established by said legislation. The propositions were considered by the state Court, and denied, as appears by the last paragraph of the final decree rendered by the said court, here given, viz: "And it is further ordered, adjudged, and decreed that the claim of said defendants that the Constitution of the United States, and certain acts of the Congress of the United States, one entitled 'an act to authorize the construction of certain bridges and to establish them as post-roads,' approved July 25th, 1866; and another entitled 'an act to facilitate commercial, postal, and military communication among the several States,' approved June 15th, 1866, render void and of no force and effect the covenants sued on in this action by said plaintiffs in the contract and supplemental contract which are the subject of this action, be, and the same is hereby, denied; and it is ad-

judged that said Constitution and said acts of Congress do not in any manner affect the validity or force and effect of either or any of said covenants, or of either of said contracts." p. 44. And a decree was rendered in favor of defendants in error for "seventy-three thousand one hundred and eighty-six dollars, together with the costs of this suit." The present writ of error was sued out under the 25th section of the judiciary act in order that this Court may review certain alleged errors in said decree.

II.

ASSIGNMENT OF ERRORS.

The plaintiffs in error assign the following as errors in the decree rendered by the Supreme Court of the State of Iowa:

1. The Court erred in deciding that the Constitution of the United States does not in any manner affect the validity or force and effect of either or any of the covenants contained in the contracts sued on, or of either of said contracts.

2. The Court erred in deciding that the act of June 15, 1866, does not in any manner affect the validity or force and effect of either or any of the covenants contained in the contracts sued on, or either of said contracts.

3. The Court erred in deciding that the act of July 25, 1866, does not in any manner affect the validity or force and effect of either or any of the covenants contained in the contracts sued on, or of either of said contracts.

4. The Court erred in denying the claim of the plaintiffs in error that the covenants sued on in this action as contained in the supplemental contract were rendered void by the Constitution of the United States and the acts of Congress referred to in the foregoing assignments of error.

5. The Court erred in deciding that the contract sued on is a valid contract, and rendering a decree thereon in favor of the defendants in error.

JAMES F. WILSON,
Attorney for Plaintiffs in Error.

ARGUMENT.

The argument of this case will be facilitated by condensing the errors assigned into one general proposition, viz:

That the contract sued on in this action is repugnant to the commercial power of Congress as exercised in the passage of the acts of June 15, 1866, *and July* 25, 1866, *and in contravention of the public policy established thereby.*

This case is one of more than ordinary importance. Its result will affect very many persons who do not appear upon the record. It cannot be resolved within the narrow limits covered by the few thousands of dollars for which the defendants in error recovered a decree in the Supreme Court of the State of Iowa. Involving, as it does, questions of public policy, it brings within its scope many parties whose interests are to be protected even at the expense of the immediate litigants. It does not concern the public whether or not the plaintiffs in error are indebted to the defendants in error in the sum of $73,186.00; but if the recovery of that sum is to affirm the claim of the defendants in error to stand as tax-gatherers, demanding the tribute of one cent per bushel for all of the grain from Nebraska, Dakota, and Iowa, belonging to the inter-state commerce of the country, that may cross the Mississippi river at Dubuque, seeking a market in some other State, or in a foreign country, then a very deep public concern occurs. When a case develops such an element as this, it rises to a higher plane than one involving only the private interests of individuals or corporations whose controverted contracts affect none but themselves. When such a juncture is reached, the Court becomes the guardian of the public weal as fully as it is the protector of private rights.

I.

The Constitution of the United States confers on Congress the power—

"To regulate commerce with foreign nations and among the several States."

This power is vested in Congress exclusively, and every State law, contract of corporations, and agreement between individuals, which affect commerce with foreign nations, and among the States, must be held subordinate, and yield to it whenever conflict occurs. *McCullough vs. the State of Maryland*, 4 Wheaton, 316.—*Gibbons v. Ogden*, 9 Wheaton, 1. *Brown v. the State of Maryland*, 12 Wheaton, 419. *Passenger cases*, 7 Howard, 283.—*Cooley v. Board of Wardens, &c.*, 12 Howard, 299. *Wheeling Bridge case*, 18 Howard, 421. *Crandall v. Nevada*, 6 Wallace, 35. *Veazie Bank v. Fenno*, 8 Wallace, 533. *Commonwealth v. Knox*, 6 Massachusetts, 77. *Blanchard v. Russell*, 13 Massachusetts, 14. Story's Com. on the Constitution, 4th Edition, pp. 2 to 22 inclusive, and notes. Story on Contracts, 3d Edition, § 545 and Chap. 19.

In the exercise of its constitutional power Congress passed "an act to facilitate commercial, postal, and military communication among the several States," which reads as follows, viz:

"Whereas the Constitution of the United States confers on Congress, in express terms, the power to regulate commerce among the several States, to establish post roads, and to raise and support armies: Therefore,

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That every railroad company in the United States, whose road is operated by steam, its successors and assigns, be, and is hereby, authorized to carry upon and over its road, boats, bridges and ferries, all passengers, troops, government supplies, mails, freight, and property on their way from any State to another State, and to receive

compensation therefor, and to connect with roads of other States, so as to form continuous lines for the transportation of the same to the place of destination; *Provided*, That this act shall not affect any stipulation between the Government of the United States and any railroad company for transportation or fares without compensation, nor impair or change the conditions imposed by the terms of any act granting lands to any such company to aid in the construction of its road, nor shall it be construed to authorize any railroad company to build any new road or connexion with any other road without authority from the State in which said railroad or connexion may be proposed.

"SEC. 2. *And be it further enacted*, That Congress may at any time alter, amend, or repeal this act.

"Approved June 15, 1866."

—*Statutes at Large*, Vol. 14, p. 66.

This act of Congress had its origin in a contest between the Delaware and Raritan Bay Railroad Company, of the State of New Jersey, and the Camden and Amboy Railroad Company of said State. The former company petitioned to Congress for relief against the claims and demands of the latter company under a monopoly of the carrying trade between the cities of New York and Philadelphia conferred by its charter from the State of New Jersey. The bill reported to the House of Representatives, in response to the said petition, was solely for the relief of the petitioning company; and the report of the committee accompanying the bill states the facts found as follows, viz:

"The petitioners pray that their roads and the boats connected with them may be declared post and military roads of the United States.

"The committee find that the petitioners have completed a road of sixty-five miles in length, from Port Monmouth, near Sandy Hook, to Atison, nearly east of the city of Philadelphia, and that they also have the control of the Camden and Atlantic Railroad Company; and that the two roads are connected by the Botsto branch of the Camden and Atlantic Railroad Company; and that

by means of these roads and boats on the Raritan bay and Delaware river, a continuous through line is constituted between the cities of New York and Philadelphia.

"The committee find that since the petition was brought before this committee, the Chancellor of New Jersey, at the suit of the Camden and Amboy Railroad Company, has enjoined the use of the petitioner's roads, except for local purposes, and has ordered that the Raritan and Delaware Bay Railroad Company pay to the Camden and Amboy Railroad Company all sums collected by the former for through business, including the amount received for the transportation of troops; and the Chancellor decreed that the petitioner's road had no right to carry or aid in carrying passengers and freight between New York and Philadelphia.

"The committee find that the act of the State of New Jersey, by authority of which the petitioner's have been enjoined from carrying on their roads passengers and freights between New York and Philadelphia, is as follows: 'That it shall not be lawful, at any time during the said railroad charter, ((to wit the Camden and Amboy,)) to construct any other railroads in this State, without the consent of the said companies, which shall be intended or used for the transportation of passengers or merchandize between the cities of New York and Philadelphia, or to compete in business with the railroad authorized by the act to which this supplement is relative.'" (New Jersey Session Laws for 1854, p. 387.)) Vol. I., *Reports Comm. House Rep., 1st Session 33th Congress, report* 31.

The debate on the bill was earnest and elaborate, and occurred at intervals during the 38th Congress and the first session of the 39th. As the discussion progressed the subject grew in importance in the estimation of Congress. The attention of the Legislature of New Jersey was drawn to it, and that body passed concurrent resolutions protesting against the passage of the bill, the 4th of which read as follows, viz::

"4. Because such special legislation, aimed only at New Jersey, would be a wanton insult to the dignity of the State, in derogation

of her reserved rights and in violation of the contracts she has made, and which have been pronounced by the courts to be constitutional and binding." *Cong. Globe, part* 3, 1*st Session* 38*th Cong., p.* 2261.

The idea of special legislation lost favor as the discussion went on, until on the 12th of May, 1864, a substitute for the original bill was adopted by the House of Representatives in these words, viz: "That every railroad company in the United States, whose road is operated by steam, its successors and assigns, be, and is hereby authorized to carry upon and over its road, connections, boats, bridges, and ferries, all freight, property, mails, passengers, troops and government supplies, and to receive compensation therefor." *Ibid.* 2264. The measure failed to pass the two Houses during the 38th Congress. It was renewed in the 39th Congress, when, after most thorough discussion, it assumed the shape of the act of June 15, 1866, and become a law. It was given this general character in order that continuous lines could be had over all connecting roads in whatsoever States they might be situate. So much for the history of the act of June 15, 1866. The language used by Chief Justice Marshall concerning the bill incorporating the Bank of the United States, in the opinion delivered by him in the case of *McCulloch v. State of Maryland*, may with great appropriateness be applied to the one now under consideration: "The bill" * * * "did not steal upon an unsuspecting legislature, and pass unobserved. Its principle was completely understood, and was opposed with equal zeal and ability."

It is not difficult to ascertain from the face of the act itself that the purpose of its passage was well expressed in its title, "to *facilitate* commercial, postal and military communication among the several States." Now, according to Webster's definition, to facilitate is "To make easy or less difficult, to free from difficulty or impediment, or to diminish it: to lessen the labor of." Therefore whatever stood in way of railroad companies possessing connecting lines of roads, whether the connections were made directly by joined tracks, or indirectly by means of bridges, boats,

or ferries, from affording continuous lines of transportation for passengers or freight passing from one State to another, was removed out of the way. Continuous lines of transportation make communication between the States more easy and less difficult: freer from difficulty or impediment, and lessen the labor of transit. If a charter like that of the Camden and Amboy Railroad company stood in the way, it was removed. If state statutes forbidding direct connections at state lines presented vexatious impediments, they were overborne. If private contracts requiring the unloading of freight and imposing a charge for handling the same, offered difficulties to rapid transit over continuous lines, and imposed unnecessary burdens upon traffic, they were pushed aside —all this that commercial communication among the several states might be facilitated.

In direct furtherance of this plainly expressed policy, Congress passed the act of July 25, 1866, (*Statutes at Large*, Vol. 14, p. 244,) entitled, "an Act to authorize the construction of certain bridges, and to establish them as post roads," the first section of which reads as follows, viz:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That it shall be lawful for any person or persons, company or corporation having authority from the States of Illinois and Missouri for such purpose, to build a bridge across the Mississippi river at Quincy, Illinois, and to lay on and over said bridge railway tracks, *for the more perfect connection of any railroads that are or shall be constructed to the said river at or opposite said point, and that when constructed all trains of all roads terminating at said river at or opposite said point, shall be allowed to cross said bridge for reasonable compensation* to be made to the owners of said bridge, under the limitations and conditions hereafter provided."

The act further provided for the construction of bridges at Burlington, Dubuque, McGregor, and Keokuk, Iowa; St. Louis, Hannibal, and Kansas City, Missouri, and Winona, Minnesota.

The provision relative to the Dubuque bridge is in these words:

Sec. 9. *And be it further enacted*, That a bridge may be constructed and maintained across the Mississippi river, between Dunleith, in the State of Illinois, and Dubuque in the State of Iowa, with the consent of said States previously given, or hereafter acquired, with the same privileges, *upon the same terms, and under the same restrictions as are contained in this act, for the construction of a bridge at Quincy, Illinois.*"

It will be observed that there was to be no exclusiveness about these bridges. Their construction was authorized "for the more perfect connexion of any railroads that are or shall be constructed to the said river," at points where the bridges were to be located, and all such roads were secured the right to cross the bridges for reasonable compensation. But Congress took care that the bridges should be so constructed as not to obstruct the navigation of the Mississippi river. Provision to this end is made in the second section of the act. This was intended to preserve the facilities of commerce on that river. The placing of all railroad companies on an equality in the use of the bridges was designed both to preserve the free use of the river by avoiding the necessity of numerous bridges, and to lessen the cost of crossing the stream, and thus facilitate the commerce which might seek the markets of the country by rail. One bridge was made to answer for the crossing of all roads touching the river at the point of its location. This seems to have been the settled policy of Congress in the passage of the act of July 25, 1866; for it has been adhered to in the passage of bridge acts subsequent to that date. By the act of June 30, 1870, (Statutes at Large, Vol. 16, p. 173) authorizing the construction of a bridge across the Niagara river; the act of July 14, 1870, (*Ibid.* p. 275) authorizing the construction of a bridge across the Missouri river; the act of March 3, 1871, [*Ibid.* p. 473] authorizing the construction of bridges across the Mississippi and Missouri rivers; the act of March 3, 1871, [*Ibid.* p. 600,] authorizing the construction of a bridge across the Wabash river; the act of March 5, 1872, [*Session laws of Congress*, p. 16,] authorizing a bridge at St. Joseph, Missouri; the act

of April 1, 1872, [*Ibid.* p. 31,] authorizing a bridge at Clinton, Iowa; the act of May 11, 1872, [*Ibid.* p. 93,] authorizing a bridge at Booneville, Missouri; the act of May 15, 1872, [*Ibid.* p. 113,] authorizing a bridge across Lake St. Croix; the act of May 17, 1872, [*Ibid.* p. 116,] authorizing the construction of certain bridges across the Mississippi river; the act of May 25, 1872, [*Ibid.* p. 163,] authorizing a bridge at Fort Madison, Iowa, the equality of all railroads in the use of bridges authorized is expressly secured; and then by the act of June 4, 1872, *Ibid.* p. 227,] a general provision was enacted relative to allbridges thereafter "constructed over and across the Mississippi river, under authority of any act of Congress, securing said equality of use, and directing the Secretary of War in locating any such bridge, to 'have due regard to the security and convenience of navigation, to convenience of access, and to the wants of all railways and highways crossing said river.'" By these enactments Congress was looking to something higher and of greater public importance than the mere convenience of railroad corporations. It was establishing a policy for the promotion of the commercial interests of the country. This policy was in aid of the one contained in the act of June 15, 1866, which pronounced the formation of continuous lines for transportation for freight and passengers among the States to be its chief end. The effect of this legislation has been to supplement the means of forming connections enumerated in that act, so that its practical reading now is: "That every railroad company in the United States, whose road is operated by steam, its successors and assigns, be, and is hereby, authorized to carry upon and over its road, boats, bridges, and ferries, *and over such bridges as by any act of Congress it is entitled to use*, all passengers, troops, government supplies, mails, freight, and property on their way from any State to another State, and to receive compensation therefor, and to connect with roads of other States so as to form continuous lines for the transportation to the place of destination.

No one can doubt what the rule of public commercial policy thus established is, nor question its wisdom. The policy is,

through lines of transportation for passengers and freight passing from one State to another State—the abolition of unnecessary changes, delays, breaking of bulk, and attendant wastage, cost, charges and loss of time. These were to end so for, at least, as the means at the command of railway companies could be utilized to effect that result. Commerce was to be facilitated. This rule was established not merely for the benefit of railroad companies, for their convenience and greater profit, but for the advancement of the interests of the great and constantly augmenting inter-state commerce of the country, and of every one connected therewith, either as passenger, or shipper, or producer, or consumer of things transported.

II.

The contract under which this case arises is repugnant to this rule of public commercial policy.

1. The letter of the contract is repugnant to this policy.

So much of the contract as is involved directly in this cause is here quoted, and is in these words, viz:

"The Dubuque elevator agree to receive and discharge for the Dubuque & Sioux City Railroad company all *through-grain* at one cent a bushel, and shall make no charge for storage unless the grain is in store more than ten days. In case the grain is held in store for the railroad company more than ten days, the Dubuque Elevator shall have one cent a bushel for the first ten days (or fraction of ten days) following the ten days without charge, and shall have one cent a bushel for every additional ten days or fraction of ten days."

"And the Dubuque & Sioux City Railroad company agree that the Dubuque Elevator *shall have the handling of all through grain, and agree to pay the Dubuque Elevator one cent a bushel for receiving and discharging thereof as aforesaid, and agree to*

pay for storage as aforesaid, when the same exceeds ten days." (*Record p.* 4.)

This suit is founded on an alleged breach of that part of the contract above placed in italics.

The term "through-grain" means grain consigned to some point beyond the State of Iowa. This explanation is given of the term in the testimony of W. F. Blake:

"Q. What do you mean by through-grain?

"A. Grain consigned by shipper to Chicago, or points east of Chicago." (*p.* 35.]

Also in the testimony of J. P. Farley a like explanation is given, thus:

"Q. What do you mean by the term through-grain, as used by you in your examination in chief?

"A. I mean grain destined to points beyond our line of road, or the State of Iowa, or I should say, beyond Dubuque. Grain consigned to parties in Dubuque is not through-grain at all." [*p.* 39.]

In the original petition filed in the state Court by the defendants in error the same definition is given to the term. In the petition the breach of contract is thus stated: "And your petitioners further aver that since the first day of October, A. D. 1867, when the said Illinois Central Railroad Company entered into the possession of said Dubuque & Sioux City railroad, and commenced operating the same under the contract last above mentioned, large quantities of through-grain have been received by the said Illinois Central Railroad Company at points on the said Dubuque & Sioux City Railroad west of the said city of Dubuque, for transportation along and over said railroad to its terminus at Dubuque, *and thence to other points beyond said terminus*, without permitting plaintiffs to have the handling of the same at their elevator, or paying them one cent per bushel thereon, as provided in the contracts aforementioned." [*p.p.* 2, 3.] There is no dispute about the meaning

of the term "through-grain." It means grain passing from Iowa to some other State. And hence this case is narrowed down to this:

The plaintiffs in error claim that by virtue of the rule of public commercial policy hereinbefore stated, they had the right to transport over their railroads, boats, bridges, and ferries, and over the bridge constructed across the Mississippi river between Dubuque, Iowa, and Dunleith, Illinois, connecting their two roads terminating at the eastern and western termini of said bridge, grain passing from Iowa to Illinois or some other State, without delivering the same to the defendants in error to be run through their elevator at a charge of one cent per bushel; and that being possessed of the right to so transport said grain as to afford it a "continuous line of transportation to the place of destination," they are not bound to impose on it the unnecessary tax of one cent a bushel, by paying the same to the defendants in error, and then charging it over against the grain, as they would have the right to do. For, inasmuch as they own their own roadway and have the right to transport thereon, they may add the elevator charge to the charge for transportation without further authority. *Case of the State Freight Tax*, 15 Wallace, 274.

This position is denied by the defendants in error, who aver in their supplemental petition (pp. 13, 14,) "That the defendants" [plaintiffs in error] "are daily receiving through-grain, as aforesaid, and are daily passing the same through Dubuque, without permitting plaintiffs to have the handling of the same at their elevator, as aforesaid, and without paying plaintiffs therefor; and since the institution of said original suit, the defendants have daily violated said contract and supplemental contract, and they are now, from day to day, wilfully and fraudulently violating the same by passing large quantities of through-grain through Dubuque without allowing plaintiffs' elevator to handle the same, and without paying the plaintiffs therefor, which grain so passed plaintiffs are entitled to have the handling of under said contract and supplemental contract."

This averment reduced to its real meaning is this: "Every car load of grain shipped over the railroad of plaintiffs in error, from the State of Iowa to some other State, must, on its arrival at Dubuque, be stopped and run up to the Dubuque Elevator, there to be unloaded, the grain run through the elevator, be re-loaded, and pay one cent a bushel for the service rendered before it can be allowed to pass across the Mississippi river and on to its destination; and that in any event the one cent a bushel must be paid."

It would be difficult to invent a claim more repugnant to the policy established by Congress than this. The two cannot stand together.

2. The practical operation and effect of the contract are opposed to this policy, and constitute a restraint upon inter-State commerce.

The purpose of Congress was in part to facilitate the movement of this through-grain, reduce the cost of transportation, and thereby benefit both producer and consumer. In pursuance of this purpose the Illinois Central Railroad Company did, as is alleged in the pleadings of the defendants in error, transport eight millions two hundred thousand bushels of through-grain from points of shipment to places of destination without breaking bulk. To have passed this grain through the elevator at Dubuque, would have cost the shippers $82,000 in direct elevator charges. The testimony shows that a large part of this cost has been saved to shippers by the refusal of the plaintiffs in error to recognize any obligation to deliver this through-grain to the defendants in error under said contract. Three hundred and forty bushels of grain constitute a car load. [Testimony of J. P. Farley, p. 38.] Divide the total number of bushels—8,200,000—by 340, the number of bushels per car load, and it gives the number of cars crossed at Dubuque loaded with through-grain as 24,117. Now, while the nominal price for crossing a loaded car was $3.40, it really cost the shipper, and consequently, the consumer, a great deal more. The testimony shows that the actual cost was as high as $16.20 to unload a car on the Iowa side of the Mississippi river, pass the

grain through the elevator, transport it across the river, and reload it into a car on the Illinois side; [*Ibid. p.* 38,] thus representing a total cost of $390,705.40 for the transhipment of 8,200,000 bushels of grain, $82,000 of which would go to the elevator, and leaving $308,705.40 to be charged up to shortage, teaming, extra handling, &c., but all of which arose from the mode of transfer, and is properly chargable to the elevator contract. Under the mode of transfer adopted by the plaintiffs in error, it cost from $2.00 to $5.00 per car, say an average of $3.50 per car, or $85,409.50 for the whole number, against $390,765.40 under the contract plan, giving a net gain to shippers and consumers of $306,795.00 on 8,200,000 bushels of grain. And this advantage they actually derived through a reduction of the rates of transportation in proportion to the amount saved between transferring through elevator, and by the mode adopted by the plaintiff in error. (*Ibid. p.* 39.)

That these facts show that the practical operation and effect of the contract are repugnant to the policy established by Congress and constitute a restriction upon inter-state commerce, is too clear to require much argument in support of the proposition. The transfer of grain by means of the elevator is entirely unnecessary, and has been so from a period ante-dating the lease of the Dubuque & Sioux City Railroad by the Illinois Central Railroad Company. The charges sought to be imposed on through-grain by reason of the terms of the contract would be burdensome to transportation, for they would enter into and become a part of the cost thereof. "Transportation is essential to commerce, and every burden laid upon it is *pro tanto* a restriction." 15 Wallace, 281. And when the restriction is not only unncessary, but is also a burden for which no return is rendered to the commerce which it affects, and tends to interrupt or interfere with the facilities granted thereto by law, then it becomes the duty of the courts, when appealed to, to remove it.

III.

The refusal of the Plaintiffs in error to recognize the pretended obligation of the contract sued on, is in obedience to law.

If there ever was any necessity for the mode of transferring through-grain at Dubuque provided in the said contract, it no longer exists. Since November 1, 1867, when the Illinois Central Railroad Company commenced to operate the Dubuque and Sioux City Railroad, loaded cars have been crossed from Iowa to Illinois at a cost of from $2.00 to $5.00 each—the cost now being $5.00 over the bridge. (Testimony, p. 38.) Throwing out of view all cost of transfer under the said contract except the one cent per bushel, or $3.40 per car, the only result to be derived from an observance of the contract by the plaintiffs in error would be the imposition of that amount as an extra charge or tax upon every car load of through-grain crossing the Mississippi river at Dubuque, Iowa, in search of a market in some other State. This is the mildest form in which the case can be stated. The bridge is a safe and convenient mode of transfer. It is a lawful mode of transfer. Its construction was authorized for the express purpose of affording a more perfect connection between the two railroads involved in this suit. Its use for that purpose will be continued. The charge for such use is $5.00 per car. To comply with the claim of the defendants in error would add a minimum charge of $3.40 to each car. This the plaintiffs in error refuse to do; and this refusal is believed to be an obedience to law. If it is not, and the contract is still to be enforced, then Congress did not facilitate commerce among the States by passing the acts of June 15, 1866, and July 25, 1866, but burdened it and obstructed it. No one will pretend that the plaintiffs in error have not a lawful right to use the bridge at Dubuque for the transfer of through-grain, and to form a continuous line of transportation for it over their two roads. Nor will any one deny that a reasonable compensation must be paid to the owners of the bridge for the use of it; for such is the plain, unchallenged letter of the law. This being granted, who will say

that when Congress granted to the plaintiffs in error the right to use the bridge, and by the same act imposed on them the duty to render compensation for such use to the owners thereof, that it also intended to preserve to the defendants in error the right to enforce a charge of one cent per bushel for all of the through-grain which might be carried over said bridge? Is it possible that anything so absurd could have entered into the purposes of Congress? Will it for one moment be claimed the rights granted by the acts of Congress can only be exercised under the restrictions created by the contract upon which this suit rests?—Such a claim would seem preposterous in the extreme. The refusal of the plaintiffs in error to recognize such a claim is in obedience to the law, and in furtherance of the interests of commerce.

IV.

The Illinois Central Railroad Company had no power to assume the contract entered into between the Dubuque & Sioux City Railroad Company and the Dubuque Elevator Company relative to through-grain.

The contract of assumption bears date September 13, 1867.—The act of Congress to facilitate commerce was approved June 15, 1866, and the act authorizing the construction of the Dubuque bridge was approved July 25, 1866—both of them having been in force more than a year prior to the assumption. The bridge was well advanced towards completion on September 13, 1867; and was in actual use by the Illinois Central Railroad Company on and after December 22, 1868. The said railroad company took possession of, and commenced operating, the Dubuque & Sioux City Railroad, October 1, 1867. In November, 1867, through-grain was transferred across the Mississippi river by running the cars on to a ferry-boot; and this mode of transfer continued (except during a part of that winter while navigation was closed, when it was sacked and hauled over on sleds and wagons,) until the bridge was done, over which the grain cars have been crossed ever since. [*Farley's testimony*, p. 37.]

With this state of facts before us, it will be seen that the Illinois Central Railroad Company was not affected by the restriction contained in the last clause of the proviso to Sec. 1, of the Act of June 15, 1866, which declares that the act shall not "be construed to authorize any railroad company to build any new road or connexion with any other road without authority from the State in which said railroad or connexion may be proposed." The Illinois Central Railroad Company owned the railroad on the east side of the river, and practically owned the road on the west side of the river by virtue of the lease which it held for the term of twenty years. Thus the two roads constituted one line under the same management. It possessed the means of making the necessary connection by ferry-boats, and also the right to use the bridge in course of construction, which construction was authorized for the more perfect connection of these roads, as well as any other that might be built to the approaches of the bridge. The aforesaid restriction then did not apply to the said railroad company. Taking these facts altogether this question is pertinent: Would it have been lawful for the Illinois Central Railroad Company, on the 13th day of September 1867, to have made an original contract with the defendants in error, for the handling and transferring of through-grain of exact character with the one executed by and between the Dubuque & Sioux City Railroad Company and the Dubuque Elevator Company—that being the one on which this suit is based? It would seem that there can be but one answer to this question, and that, a negative. Certainly such a contract made at that date would be repugnant to public policy, and void. It would have contravened every purpose of Congress in passing the acts aforementioned, and "the rule of law applicable to this class of cases is, that all agreements which contravene the public policy are void, whether they be in violation of law or morals." (*Story on Contracts, 3d Ed.*, § 545.)

We have before us a railroad company operating a great line of road running from Chicago west to the Missouri river, and reaching across two States. Its line is broken by the Mississippi river. Across that stream it is provided with a safe, convenient,

expeditious connection for the two portions of its road. So perfect is the connection that freight placed on the cars at the Missouri river need not be handled again until it shall have traversed two great States and arrived at Chicago. Have the public no right to be protected in the enjoyment of the safety, convenience, and expedition which such a line, and such a connection afford for the transportation of articles of commerce from one State to another? Can the company contract these interests all away, and impose a wholly unnecessary charge upon the inter-state commerce affected by such contract in addition? No one will be bold enough to assert that this can be done. But if the contract sued on in this action were to be made to-day between the said railroad company and the defendants in error its effect would be, so far as they could command it, just of the character indicated. The company has now no power to enter into such a contract. It would act in violation of law and contrary to public policy by so doing. As a present original contract it could not be defended for a moment.

The fact that the original contract was made prior to the passage of the acts of Congress referred to does not help the case in any particular. The Constitution of the United States declares that: "This Constitution and the laws of the United States made in pursuance thereof" * * * * * "shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." Contracts relating to subjects over which Congress is intrusted with discretionary powers, such as the power to regulate commerce among the States, must be made in view of, and subject to, such rightful use of its authority as it may elect to make. If the contract sued on in this case did not violate public policy at the time it was made, it did do so at the date of the assumption of its obligation by the Illinois Central Railroad Company. It was void at that date because it did contravene public policy. If this be not so, then the contract, and not the Constitution and laws of the United States, is the supreme law of the land touching everything within its scope. The contract from the first was subordinate to the power of Congress to regulate

commerce, and while it might stand in the absence of any conflicting commercial regulation enacted by Congress, it cannot continue in force as against such a regulation when once established. Such a contract is of no greater force than a state statute; and while it is a well settled doctrine that the states may, in the absence of national legislation, legislate concerning many subjects over which Congress possesses power superior to the States, it is equally well settled that when Congress does act its action is supreme. "The mere giving of power over certain objects to Congress did not necessarily deprive the State Legislatures of the same powers antecedently enjoyed by them, unless the exercise of these powers should interfere with the authority of the general government, in which case the power of the State must undoubtedly give place." (13 *Massachusetts*, 14.) "And if the statute of any state should contain provisions prohibitory to the execution of the powers authorized by a constitutional act of Congress, such provisions will not have the force of law." *6th Massashusetts*, 77. (*2d Vol., Story on Constitution, 4th Ed., note to* § 1115, *p.* 51. 4 *Wheaton*, 122. 6 *Wheaton*, 131. 12 *Wheaton*, 213. 1 *Wallace*, 222.)

Private contracts are in no better position than State laws.—They are all subject to the supreme powers of Congress when they relate to subjects covered by those powers. A commercial regulation established by Congress within the scope of its constitutional power must be superior to all contracts affected thereby, no matter when they were made. If this be not so, then the powers of Congress, touching all subjects to which they apply, might be so fettered and obstructed by private contracts as to utterly fail the purposes of their creation. To state the proposition with more exactness, the power of Congress to regulate commerce among the several States enters into, and becomes a part of, every contract concerning that commerce. Every such contract is made in view of the possible exercise of the power by Congress in a manner, and by the establishment of such regulations, as will be inconsistent with its written terms and conditions. But this possibility is as much a part of the contract as though it were written at length in the body thereof.

Congress has power "to establish uniform laws on the subject of bankruptcies, throughout the United States." During the greater part of the nation's history this power has been dormant. But during all the period of its inactivity every private contract was made in view of its possible exercise by Congress; and every such contract, no matter how well ordered and definite its terms were, was liable to be seriously affected by Congressional enactment. The contract which provided for the payment of a certain sum of money at a definite time, was liable, through the operation of a subsequently enacted bankrupt law, to be discharged for a less sum, and, indeed, for no sum at all.

Congress has the power "to coin money, and regulate the value thereof;" "and to make all laws which shall be necessary and proper for carrying into execution" all of the powers "vested by this Constitution in the government of the United States, or in any department or officer thereof." Prior to the passage of the act of February 25, 1862, gold and silver coin alone [except for inconsiderable amounts] constituted the only legal tender for the discharge of debts. Still, private contracts made specifically payable in gold and silver coin, were subordinate to the aforesaid powers, or rather, those powers were, by implication, a part of the contracts. Hence, when by said act Congress declared that United States notes issued in pursuance thereof shall "be lawful money and a legal tender in the payment of all debts," &c., this court said in the *Legal Tender cases*, "contracts must be understood as made in reference to the possible exercise of the rightful authority of the government, and no obligation of a contract can extend to the defeat of legitimate government authority." 12 *Wallace*, 551. In all cases private contracts must yield when they conflict with acts of Congress passed in pursuance of its recognized powers. "Nor is the rule applicable only to contracts expressly forbidden; for it is extended to such as are calculated to affect the general interest and policy of the country." 2 *Peters*, 541,) "and all contracts in violation of law are void on general principles—it is not necessary that the law should declare them void." [*Ibid.*, p. 527.] Nor does it matter whether the

contract was made prior or subsequent to the passage of the law by Congress.

The commercial power of Congress extends even beyond the limits hereinbefore indicated. It controls even the unexecuted decrees of this court. A notable example of this is to be found in the Wheeling Bridge case, 18 Howard, 421. In that case this court had declared that the complainant had "a just and legal right to have the navigation of the Ohio river made free by the removal of the bridge, or by its alteration." Before the execution of the decree, Congress declared the bridge a lawful structure and a post road. It was objected that the right declared by the decree "is not taken away by Congress declaring the bridge to be a 'lawful structure,' because Congress has no judicial authority to review or reverse the judgment of the Supreme Court, and such declaration is not within the scope of the legislative authority of Congress." But this Court held that it was competent for Congress in the exercise of its power to regulate commerce to pass the act, and that when passed it was superior to the decree of the Court. And thus we find that State statutes, private contracts, and unexecuted decrees of the highest courts all must give way before the exercise of the powers conferred on Congress by the Constitution of the United States. In no other way can the laws passed in pursuance thereof be the supreme law of the land. The necessary result springing from this doctrine would seem to be, that the Illinois Central Railroad Company had no power to assume the contract entered into between the Dubuque & Sioux City Railroad Company and the Dubuque Elevator Company relative to through-grain.

V.

The act of June 15, 1866, did not confer a mere privilege on Railroad Companies which they may exercise, or not, at their pleasure.

It was urged in the State court, and will doubtless be repeated here, that the act of June 15, 1866, did "no more than simply to

give authority to the Railroad Companies to do the things therein mentioned;" "that it conferred a privilege which railroad companies can avail themselves of or not, at their pleasure." This view of the scope and effect of the act of Congress was adopted by the Supreme Court of the State of Iowa, (33 *Iowa R.*, 498,) and this remarkable conclusion arrived at: "That the public commercial policy of the country favors continuous transportation may be conceded. But that policy is enforced by no laws, either of legislative enactment or judicial recognition. Contracts in contravention of a general policy of this character are not invalid. These remarks will be understood as applying to roads in different States, and not to roads in this State." [*Ibid.*, 500]

It is difficult to comprehend this confused statement. It is admitted that "the public commercial policy of the country favors continuous transportation." The line of railroad operated by the plaintiffs in error affords continuous transportation from the Missouri river to Chicago. But the contract sued on breaks this line in two at Dubuque, so far as through-grain is concerned. Then the contract is opposed to the admitted public policy of the country. Which must yield—the public policy or the contract? The Supreme Court of Iowa says, that the public policy must yield. Why? Because "that policy is enforced by no laws, either of legislative enactment or of judicial recognition." Does this mean that because the admitted public policy does not embrace some penal sanctions providing for fining, imprisoning, or hanging persons who may obstruct or violate it, it cannot be enforced, and that private contracts may run riot over it at will? This would seem to be the idea in view of the declaration that: "Contracts in contravention of a general policy of this character" [that is a public commercial policy favoring continuous transportation] "are not invalid." But the language of this court is, that such contracts as are calculated to affect the general interests and policy of the country are invalid. (2 *Peters*, 540.) If the contract is repugnant to public policy that is sufficient to determine its invalidity. Whether or not there is any special mode provided for the enforcement of the policy has nothing to do with the question.—

It is enough when an action is brought to enforce such a contract to set up the public policy to which it is repugnant as a defence. That the state court was not unmindful of this doctrine would seem to be evidenced by the caveat inserted in the opinion quoted from, in these words: "These remarks will be understood as applying to roads in different states and not to roads in this state." That is to say, there is one rule which allows private contracts repugnant to a public commercial policy affecting inter-state commerce to be enforced, and another by which they will be held to be invalid if they relate only to the domestic commerce of the state of Iowa. Fortunately for the country this is not the law. Nor is the proposition that the act of June 15, 1866, is a mere contrivance for the convenience of railroad companies, a something which they can put off and on at pleasure, believed to be the law. If such views of that act are correct then its passage by Congress was a piece of stupid trifling with one of the most important powers entrusted to Congress by the Constitution.

As hereinbefore explained that act had its origin in the celebrated controversy which took place upon the monopoly held by the Camden and Amboy Railroad Company of New Jersey, under which the said company claimed the exclusive right to transport freight and passengers between the cities of New York and Philadelphia. A competing line of transportation being established, it entered upon the business of carrying freight and passengers between those two cities. The Camden and Amboy Company applied to the courts of New Jersey for an injunction to restrain its rival, and to compel a statement of earnings on account of such traffic. Its efforts were successful; and the rival company appealed to Congress for relief on the ground that the carrying of freight and passengers between those cities belonged to, and was a part of, the inter-state commerce of the country. The result of that appeal, as heretofore shown, was the passage of the act of June 15, 1866, establishing a general regulation for the whole country, instead of confining it to a single State, and to but one line of transportation. That legislation did not merely confer a privilege on railroad companies which they may use or not, at

their pleasure. Running with this privilege and inseparable from it, is the duty of using it for the public good—"a duty which constituted the consideration for the privilege which was granted to them." (1 *Wallace*, 149.)

A careful examination of the act in question will conclusively show that Congress meant to effect by its passage a much more important end than the creation of a privilege which railroad companies might play with at will.

1. Its title declares its object to be to facilitate commercial, postal, and military communication among the several States.

2. The preamble asserts the particular power which was to be given effect by the passage of the act—"the power to regulate commerce among the several States."

3. The act, confining itself strictly to inter-state commerce, provides for continuous lines for transportation of all passengers, troops, government supplies, mails, freight and property on their way from one State to another State; and to effect this object selects railroad corporations created by the several States, grants to them powers which they did not before possess, and authorizes them to make such connections as will afford continuous transportation for the things enumerated to their places of destination.

4. It authorizes railroad companies rendering transportation services in pursuance of its provisions to receive compensation therefor, the statutes and judicial decrees of the several States to the contrary notwithstanding.

Does this constitute nothing more than a mere privilege which may be put on and put off at the will of any railroad company coming within the purview of the act? Or does it not devolve a duty on such companies to so use their roads, ferries, boats and bridges as to facilitate inter-state commerce by affording to it continuous lines of transportation from state to state, from point of departure to place of destination? Take the case of the Delaware

& Raritan Bay Railroad company as a test. The law of the state of New Jersey prohibited this company from carrying through-passengers and freight between the cities of Philadelphia and New York. When, notwithstanding this state law, it undertook the carrying of passengers and freight from city to city, it was enjoined from a continuance of that business, and ordered to account to another company for the earnings derived from the through traffic. It appealed to Congress for relief. Relief was given to it and to all other companies by the passage of the act under consideration. Did that company derive a mere privilege by the passage of said act which it may use or not at its pleasure? On the contrary is it not true that said company became a common carrier between the two cities of all things connected with inter-state commerce? Unquestionably the latter is its position. For all passengers and freights on their way from one state to another, and offered to that company for transportation, it is bound to use its boats, bridges, ferries and roads, the same as though it had never been under any restraint and subject to all the obligations resting upon common carriers. And so it is with every other railroad company coming within the terms of the act, and this includes the plaintiffs in error. Congress in such cases, meant both to create the privilege and to impose the duty. Of this, it would seem, there can be no reasonable doubt.

The language of the act is: "That every railroad company in the United States, whose road is operated by steam, its successors and assigns, be, and is hereby *authorized* to carry upon and over its road, boats, bridges and ferries all passengers, troops, government supplies, mails, freight and property on their way from any state to another state."

What does the term "authorized," as here used, mean? The term in the general and legislative usage of this country has the same significance as the word "empowered," concerning which it is said, "where the authority eminates from a superior, 'empowered' is imperative. In the case of a public duty such words not only authorize, they compel the exercise of the power, and

performance of the duty." *Potter's Dwarris, p.* 288. Webster's definition of the word empower is: "To give legal or moral power or authority to; to authorize, either by law, commission, letter of attorney, natural right, or by verbal license: as, the supreme court is empowered to try and decide all cases, civil and criminal; the attorney is empowered to sign an acquittance, and discharge of the debtor." The word "authorize" is defined by the same author thus: "To clothe with authority, warrant, or legal power; to give a right to act; to *empower;* as to authorize a marriage," &c. These definitions render these terms practically convertible; and perfectly so when they relate to a public duty. In this manner Congress treats them in legislative use. The Congress which passed the act of June 15, 1866, used the term "authorized" in some forty acts and joint resolutions, some of them enjoining on executive and judicial officers most important public duties; as in the act of January 15, 1866, (*Statutes at Large, Vol.* 14, *p.* 2,) it declared "That the Secretary of the Treasury is hereby *authorized* to appoint any assistant assessors of internal revenue now provided by law." This was not a privilege conferred, but was a most important public duty enjoined. In the act of June 12, 1866, [*Ibid. p.* 62,] it was provided, "That the district court of the United States for the eastern district of Missouri is hereby *authorized*, by proper decree," &c. The act of June 21, 1866, [*Ibid. p.* 69,] established a hydrographic office in the Navy Department, and in the second section *authorized* the Secretary of the Navy to cause certain things to be done therein, all of which involved public duties. The act of June 27, 1866, [*Ibid. p.* 75,] made provision for the revision and consolidation of the laws of the United States, and *authorized* the President, by and with the consent of the Senate, to appoint three commissioners to perform the duties prescribed by the act. The act of July 4, 1866, [*Ibid. p.* 86,] *authorized* the President to appoint a Surveyor General for Nevada. The act of July 13, 1866, [*Ibid. p.* 98,] *authorized* the Commissioner of Internal Revenue to designate certain places at which revenue officers should reside, and where cotton might be brought for the purpose of being weighed and marked. The act of July 28, 1866, [*Ibid. p.* 322,] *author-*

ized the Secretary of the Navy to dispose of certain property saved from the rebel steamer Florida, and to distribute the proceeds as provided by law. The joint resolution of December 21, 1865, [*Ibid. p.* 347,] *authorized* the President to expend for the immediate use of destitute Indians, a sum not exceeding five hundred thousand dollars. The joint resolution of March 22, 1866, [*Ibid. p.* 351,] *authorized* the Secretary of the Treasury to change the name of the ship Art Union, to George M. Barnard, and to grant a register in the latter name. The joint resolution of June 23, 1866, [*Ibid. p.* 361,] *authorized* the Secretary of the Treasury to pay to the State of Vermont an amount of money. The joint resolution of July 3, 1866, [*Ibid.* 362,] *authorized* the Secretary of State to hire a suitable building for the use of the State Department. The act of February 18, 1867, [*Ibid. p.* 396,] *authorized* the Secretary of the Navy to accept for the United States the title to League Island. The act of March 2, 1867, [*Ibid. p.* 467,] *authorized* the Secretary of the Treasury to sell certain property therein described. The act of February 28, 1867, [*Ibid. p.* 568,] *authorized* the Secretary of the Treasury to pay to persons from whom money had been illegally collected under the direct tax laws, the sums so collected.

It is useless to extend these citations, though it might be done almost without limit. Not only the thirty-ninth Congress used the term "authorized" in the manner indicated, but preceding and subsequent Congresses used it in the same way. All of the instances cited relate to duties imperatively imposed. Most of them relate to the public service, just as the act of June 15, 1866, relates to the interest of the public in the inter-state commerce of the country; and railroad companies coming within the scope of the last mentioned act can no more elect to do or not to do the duty therein enjoined than can the public officers under the other acts cited.

Let it be noted here that all of the alleged breaches of the covenants sued on, are laid subsequent to the first day of October, 1867. (*See petition and supplemental petitions, p.p.* 2, 8, 13.)

more than a year after the passage of the act of June 15, 1866. Let it be further noted that on the said first day of October, 1867, the Illinois Central Railroad company commenced operating the Dubuque & Sioux City Railroad in connection with their own road, making the two roads one through line from the interior of Iowa to Chicago. The mode of transfer across the Mississippi river is thus described by J. P. Farley, a witness in the case, viz: "The Illinois Central took possession of the Dubuque and Sioux City road October 1st, 1867, and have run it since. During October grain passed through the elevator; after that, commencing with November, it was transferred, by running the cars on to a ferry-boat, till the close of navigation in December. After the close of navigation we sacked the grain, and hauled it over on sleds and wagons till the close of that winter. Resumed crossing on ferry in spring until the bridge was done, in December, 1868; have crossed our cars over the bridge ever since. The ferry-boat was managed by Mr. Beck, agent of the Illinois Central Railroad Company, at Dunleith. Mr. Blake managed the transfer on this side of the river. Mr. Blake had his directions from me to change the mode of transfer by boats. I directed him to make the transfer without putting the grain in the elevator. The cars were put on the boats without breaking bulk." p. 38. * * * "As a matter of course, about that time, the Illinois Central Railroad reduced their rates of transportation in proportion to the amount saved between shipping through the elevator and the means which they had adopted, by crossing on the ferry-boat," &c. p. 39.—Testimony to the same effect was given by W. F. Blake, pp. 34 and 35. And as to the facts stated there is no dispute. Thus it appears that the plaintiffs in error have all the time been within the provisions of the act by having their connections complete and operating the two roads as one, and have uniformily observed the policy established by the act, and have uninterrupetdly conformed their practice to it, thus securing to the grain of Iowa, Nebraska and Dakota, passing over their roads, a "continuous line of transportation to the place of destination"—fulfilling to the very letter the purpose of Congress in the passage of said act. Whatever may be said as to the want of ability of other

railroad companies to conform their action to the said policy because of the limitation contained in the last clause of the first section of the act, it can have no effect in this case; for the plaintiffs in error were, as has been shown, in position to put into practice the rule of policy prescribed by the act, and have done so from the beginning. To them it was a rule obligatory. Test it in this wise: A, residing on the line of the Dubuque and Sioux City Railroad, has a train load of wheat which he desires to ship to Chicago. He delivers it to the plaintiffs in error for transportation. They move it to Dubuque, deliver it to the defendants in error under the contract sued on, who unload it, run it through their elevator, reload it, and the next day it is shipped on to Chicago. During the time thus consumed wheat recedes in price ten cents per bushel, or $34.00 per car load of 340 bushels, and is sold at a loss. Will it be contended that A has no right of action against the plaintiffs in error for the damages sustained by him on account of the delay occasioned by an observance of this alleged contract? Would said contract be a good defence against such an action? Again: Suppose that A's wheat, instead of being delivered to defendants in error to be run through their elevator, was carried without change directly to Chicago, and the freight bill rendered to the consignee should contain a charge of one cent per bushel for amount paid Dubuque Elevator under the contract sued on, will it be claimed that such an item could be collected at law? or that if the consignee should tender the amount of the freight bill less the elevator charge he could not maintain an action of replevin for the wheat, it remaining unmixed with other grain? Would not the result be different in both of these supposed cases if the contract is a valid one, the act of June 15, 1866, to the contrary notwithstanding? If the duty of the plaintiffs in error under said act does not release them from the supposed obligation to pay one cent a bushel for all "through-grain" in pursuance of the terms of said contract, and they are held to its payment, then may they not rightfully charge it over to the accounts of the shippers of such grain?—If it is a legal obligation which the courts will enforce, then it is as proper a subject of charge against the transportation of

"through-grain" as any other item of expense to which the plaintiffs in error are subjected in the operation of their road?—They may rightfully add it to their charges for carriage, [15 *Wallace, p.* 274.] If the charge must be paid by the railroad company, then the "through-grain" must return it, and thus the burden is placed exclusively on freight belonging wholly to the inter-state commerce of the country passing over this company's road. Such freight must, in effect, pay a toll, in return for which it receives no benefit, no return, nothing. Just such a result would be wrought as Congress intended to prevent; and inter-state commerce, instead of being facilitated, would be hindered and oppressed.

For the sake of further illustration of this branch of the argument let it be granted that the act of June 15, 1866, does no more than confer a privilege on railroad companies which they may exercise or not, as they may elect. If they elect to exercise the privilege, what follows? Will not the law which grants the privilege protect its exercise? The act authorizes railroad companies to do certain things which, before its enactment, they could not do. Some roads were prohibited from carrying freight and passengers from one State to another State, and if they violated the prohibition were compelled to account for the resulting profits to more favored companies. The several States might have required every car upon roads within their respective jurisdictions to stop at the State lines, and unload and tranship all freight and passengers destined to another State. Congress undertook to provide a remedy for some of these evils. The remedy provided was the authority conferred on railroad companies, and the consequent limitations placed upon the powers of the States by the act referred to. The plaintiffs in error elect to use the authority so conferred, to exercise the privilege granted. What results?—Why, the restrictions and regulations, whether imposed by State statutes or private contracts, must yield to the superior power in pursuance of which the railroad companies act, at least, during the period of their election. If the State statute or a private contract must itself yield during this time, it follows logically and

necessarily that a charge, tax or toll prescribed by either must also cease. The suspension of a law suspends its obligations and its penalties. The suspension of a private contract produces a like effect, and if the plaintiffs in error may, by virtue of the elective privilege, conduct the transportation of "through-grain" in a manner different from that prescribed in the contract sued on, and entirely independent of it, they cannot be made to pay the charges which its terms impose. Hence, whether the act of June 15, 1866, imposes an obligation on the plaintiffs in error which it is their duty to discharge towards all shippers of "through-grain," or merely confers a privilege subject to their election, and they elect to exercise it, the result is the same so far as regards its effect on the contract under consideration. If a duty is imposed by the law, the contract must give way to it. If a privilege is conferred by the law, and it is exercised in pursuance thereof, the contract must yield to it. In either case the contract is repugnant to the law.

VI.

The fifth amendment to the Constitution of the United States, which prohibits the taking of private property for the public use without just compensation, does not apply to this case.

It was claimed in the state court on behalf of defendants in error, that they cannot be deprived of the advantages of their contract relative to through-grain, without just compensation being rendered therefor. This is seeking the protection of the fifth amendment to the Constitution. But that amendment does not apply to this case. Its protection was claimed in the *Legal Tender cases*, [12 Wallace, p. 457,] and the answer to the claim given in the opinion of the court is so applicable to the present case that it is here quoted. The court said: "That provision has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of

lawful powor. It has never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals. A new tariff, an embargo, a draft, or a war may inevitably bring upon individuals great losses ; may indeed render valuable property almost valueless. They may destroy the worth of contracts. But who would suppose that, because of this, a tariff could not be changed, or a non-intercourse act, or an embargo be enacted, or a war be declared ? By the act of June 28, 1834, a new regulation of the weight and value of gold coin was adopted and about six per cent. was taken from the weight of each dollar. The effect of this was that all creditors were subjected to a corresponding loss. The debts then due became solvable with six per cent. less gold than was required to pay them before. The result was thus precisely what it is contended the legal tender acts worked. But was it ever imagined that this was taking private property without compensation or without due process of law ? Was the idea ever advanced that the new regulation of gold coin was against the spirit of the fifth amendment? And has any one in good faith avowed his belief that even a law debasing the current coin, by increasing the alloy, would be taking private property ? It might be impolitic and unjust, but could its constitutionality be doubted ? Other statutes have, from time to time, reduced the quantity of silver in silver coin without any question as to their constitutionality. It is said, however, now, that the act of 1834 only brought the legal value of gold coin more nearly into correspondence with its actual value in the market, or its relative value to silver. But we do not see that this varies the case, or diminishes its force as an illustration. The creditor who had a thousand dollars due him on the 31st day of July, 1834, (the day before the act took effect), was entitled to a thousand dollars of coined gold of the weight and fineness of the then existing coinage. The day after, he was entitled to a sum six per cent. less in weight and in market value or to a smaller number of silver dollars. Yet, he would have been a bold man who had asserted that, because of this, the obligation of the contract was impaired, or that private property was taken without compensation or without due process of law. No such assertion, so far as

we know, was ever made. Admit it was a hardship, but it is not every hardship that is unjust, much less that is unconstitutional; and certainly it would be an anomaly for us to hold an act of Congress invalid merely because we might think its provisions harsh and unjust." (*Ibid.* 551, 552.)

This reasoning meets the case now in hand. It fully sustains the right of Congress to interfere with private contracts when engaged in the exercise of its powers over subjects to which they relate. It even goes further than the case requires; for in no particular does the act of June 15, 1866, interfere with the contract under which the defendants in error claim damages except the single provision contained in the supplemental contract relative to through-grain. The original contract was made August 22, 1860, and contains no provision giving to the defendants in error the right to handle all through-grain. On the contrary it contained a clause declaring: "That they will erect a building suitable for receiving, storing, delivering and handling all grains that shall be received by the cars of said Railroad Company, *not otherwise consigned.*" The Railroad Company furnished the ground on which the Elevator was erected, and covenanted "that they will not erect a similar building, namely, a building for receiving, storing, delivering and handling of grain, in the city of Dubuque; and further covenant that they will not grant or lease to any other party or parties during this lease the right to erect any such building in Dubuque," and it was further provided, "that at the expiration of fifteen years, the Dubuque Elevator will, at the option of said railroad company, accept of and enter into a renewal of this for another fifteen years exactly on the same terms as this lease, or accept in full payment for their buildings, machinery, and property necessary for the receiving, storage, delivery, and handling of grain, and the conducting of such business, the amount for which the same, by an appriasal, may be ascertained to be worth." (*Record, pp.* 3, 4.) These covenants were the inducements upon which the defendants in error acted. The right to handle all through-grain at one cent per bushel seems not to have been thought of until January, 1861, when a supplemental contract was entered

into containing a provision to that end. The effect of the act of June 15, 1866, is to render invalid this provision of the supplemental contract. In every other respect the defendants in error are left just where they were content to place themselves by the original contract. The said act of Congress was, therefore, neither harsh nor unjust, much less liable to the charge of repugnancy to the fifth amendment of the Constitution.

VII.

The power to regulate commerce ranks among the most important to be found in the Constitution. "The want of this power was one of the leading defects of the confederation, and probably, as much as any one cause, conduced to the establishment of the Constitution. It is a power vital to the prosperity of the Union; and without it the government would scarcely deserve the name of a national government, and would sink into discredit and imbecility. It would stand as a mere shadow of sovereignty, to mock our hopes and involve us in a common ruin." *Story on the Con.*, § 1057. It is justly characterized and wisely commented on in the language adopted in the case of *Gray v. Clinton Bridge* (*Am. L. Reg.*, *Jan.*, 1868, *p.* 151,) as "one of the most useful of all those confided to the Federal government, and its exercise has done as much to create and to foster that community of interest which constitutes the strongest bond of nationality, as the exercise of any other power belonging to the general government. The want of this power was one of the strongest necessities which led to the formation of the constitution. The clause has always received at the hands of the courts and of Congress a construction tending liberally to promote its beneficent object."

Every year through which our history as a nation has passed, has furnished evidence of the correctness of these views of this power. A peaceful union of the states could not have been maintained without it. As a bond of union it stands pre-eminent to-day. It leads all of the forces upon which we depend for our material

development. It has maintained the inland expansion of the nation, and has wrought out the multiplication of our states. Our vast system of inter-state communication, reaching from coast to innermost frontier, is one of its results. It has carried power throughout our borders. It has planted prosperity in every section of the Republic. It has made it possible for us to exist as one nation.

To every state this power is important; but to some more than to others. To the interior states it is life itself. As distance from the sea-board increases, as state lines multiply, as difficulties in the way of reaching the centres of trade and the ports of foreign commerce are added to, the people feel, more and more, that this power must receive "at the hands of the courts and of Congress a construction tending liberally to promote its beneficent object."

This court in *Crandall vs. Nevada*, after stating many of the rights of the government, most truly said: "But if the government has these rights on her own account, the citizen also has correlative rights. He has the right to come to the seat of government to assert any claim he may have upon that government, or to transact any business he may have with it. To seek its protection, to share its offices, to engage in administering its functions. He has the right to free access to its sea ports, through which all the operations of foreign trade and commerce are conducted, to the sub-treasuries, the land offices, the revenue offices, and the courts of justice in the several states, and this right is in its nature independent of the will of any state over whose soil he must pass in the exercise of it." 6 Wallace, 14.

No right here enumerated as of those belonging to the citizen is more important to him than the right of commercial intercourse. The "right of free access to the sea-ports, through which all the operations of foreign trade and commerce are conducted," is of more importance to the citizen when regarded in its relation to his property and articles of trade and commerce, than when applied to his personal locomotion. Comparatively few persons have occasion to personally visit the sea-ports, while the property of all seeks those outlets. Both rights are important—both are to be

protected and enforced. Not the mere rights, but the lawful means provided for their enjoyment also. The citizen has the right to travel to the sea-ports. He has the same right to transport his commodities of commerce there. When the means of travel and transportation are regulated by law, it is the citizen's right to full protection in the enjoyment of all the benefits provided by such regulation. States may not interfere with his rights. Private contracts may not interpose to his disadvantage by opposing conflicting restrictions. Legitimately is this doctrine drawn from *Crandall v. Nevada.* Every reason stated in support of the conclusion arrived at in that case, maintains the doctrine here contended for. If a State imposes a tax, that is invalid. If a railroad company by contract imposes a definite charge upon articles of inter-state commerce for pretended services not rendered, and which charge tends to obstruct or render more burdensome the ways of that commerce, such charge is unlawful and must be put aside. If this be not so, then the hurtful burdens which may be imposed on inter-state commerce cannot be foretold or numbered.

It is not the extent of the burden imposed which renders it unlawful. As this court remarked in the last case cited: "It will be observed that it was not the extent of the tax in that case which was complained of, but the right to levy any tax of that character. So in the case before us it may be said that a tax of one dollar for passing through the State of Nevada, by stage coach or by railroad, cannot sensibly affect any function of the government, or deprive a citizen of any valuable right. But if the State can tax a railroad passenger one dollar, it can tax him one thousand dollars. If one State can do this, so can every other State. And thus one or more States covering the only practicable routes from the east to the west, or from the north to the south, may totally prevent or seriously burden all transportation of passengers from one part of the country to the other."—p. 46. This reasoning leads to this conclusion—that in order to protect the citizen against the imposition of an extreme burden on his right, the law will not allow the application of any. A right arising under the Constitution, or a law of Congress, must

not be touched by the States at all. The right is protected from extreme interference, by denying to the States every degree of power to act concerning it. No matter how little or how much may be involved in the right; whether it applies to one citizen or attaches to one thousand; whether it consists in the right to ride in a coach through the State of Nevada, and thence to the Capital of the nation, or to transport a car load of grain from the State of Iowa to the port of New York; whether it be involved by State action, or obstructed by alleged contracts, the right remains and must be protected. This is what this court means when it says that the power of Congress to regulate commerce among the States is exclusive. It is what the Constitution means when it declares that this Constitution, and the laws of the United States made in pursuance thereof, shall be the supreme law of the land. The absence of this element of just power is what made the confederation weak. Its presence is what makes the Federal Government strong.

Apply these considerations to the case under dissussion. The State of Iowa is an interior State situate nearly a thousand miles from the seaboard. Four great States cover the territory spanned by the distance reaching from her eastern boundary to the coast line. This entire distance is traversed by lines of railways over which alone, during a part of the year, the people and products of the State can reach the commercial centres of the country, and the ports from which foreign commerce departs to all parts of the world, and returns therefrom. No other statement need be made to show how important to all of the people of the State is unobstructed inter-state and foreign commerce. But for the purposes of this case we need only to consider how important such commerce to is that portion of the people living immediately on the line of the Dubuque and Sioux City Railroad. What was their condition with respect to transportation rights on the 13th day of September, 1867, the date of the alleged assumption of the contract sued on in this case? It was this. On that day the railroad on which they depended solely for transportation become a part of a through line to Chicago, to Cairo, and to intermediate points.—

This was effected by the practical consolidation for a term of years with the Illinois Central Railroad. The connection between the two was made by ferry-boats, used for transporting loaded cars across the Mississippi river, and soon thereafter the connection would be made by the Dubuque bridge. On the 15th day of June, 1866, the Congress of the United States had declared that these connections should be deemed lawful connections; and that the two companies owning these railroads were, on that day, "authorized to carrry upon and over their roads, boats, bridges, and ferries, all passengers, troops, government supplies, mails, freight, and property on their way from Iowa to another State, to receive compensation therefor, and to so connect and continue to connect as to form a continuous line of transportation for such inter-state commerce as might pass over it. This was the condition of those interested in that inter-state commerce, both in fact and in law. The Illinois Central Railroad Company set itself about making this condition effective. Its cars were loaded in the interior of Iowa with grain destined to the State of Illinois. It moved those cars over the Dubuque and Sioux City Railroad, over the ferry at Dubuque, (since over the bridge,) over the Illinois Central Railroad, by continuous line of transportation to Chicago, and other points east of the State of Iowa. The defendants in error objected to this proceeding. They claimed that this continuous line of transportation should be broken in two, that all of this grain should stop at Dubuque, be unloaded at and run through their elevator, and that after being subjected to delay and wastage it should pay one cent per bushel to them. This claim was denied. The through-grain was continued to be shipped in unbroken bulk, over a continuous line of transportation, on to its places of destination. The defendants in error asserted that this was in violation of a contract under which it was their right to stop all of this grain and toll it to the extent of one cent per bushel. They brought their action in the State court, recovered a decree enforcing their claim, and this writ of error has brought it here for review.

Two pertinent questions were put in the opinion of this court

in the *case of the State Freight Tax*. After defining what commerce is these questions follow: "Then why is not a tax upon freight transported from State to State a regulation of inter-state transportation, and, therefore, a regulation of commerce among the States? Is it not prescribing a rule for the transporter, by which he is to be controlled in bringing the subjects of commerce into the State, and in taking them out?" 15 Wallace, 275. The reasons involved in affirmative answers to these two questions brought this court to the conclusion that "the act of the legislature of Pennsylvania of August 25th, 1864, so far as it applies to articles carried through the State, or articles taken up without the State and brought into it, is unconstitutional and void." *Ibid. p.* 282. The taxing power is one of the highest prerogatives of a State; but it is not allowed to interfere in the slightest degree with free communication between the several States.

Why are not the questions above quoted pertinent to this case? Why is not the charge of one cent a bushel upon all grain passing from State to State over the roads operated by the plaintiffs in error a regulation of inter-state transportation, and, therefore, a regulation of commerce among the States? Does not the contract prescribe a rule for both the transporter and owner of the said grain, by which they are to be controlled in carrying that particular kind of freight from the State of Iowa to other States? It is true that there is this difference between the *State Tax case* and this one: in the former the State being the only actor in determining the amount of tax to be levied might make it extremely burdensome or even prohibitory, while in the latter there being two or more parties to be consulted and brought to an agreement one might act as a check on the rapacity of the others. But it is the character and not the extent of the burden which is to control. The State of Pennsylvania levied a tax upon inter-state commerce for public purposes. The defendants in error seek to continue a charge on inter-state commerce for the purpose of private gain. True, that the tax applied to all railroads in the State of Pennsylvania, and to all inter-state freight transported over them, while the contract charge applies to but one line in the State of Iowa,

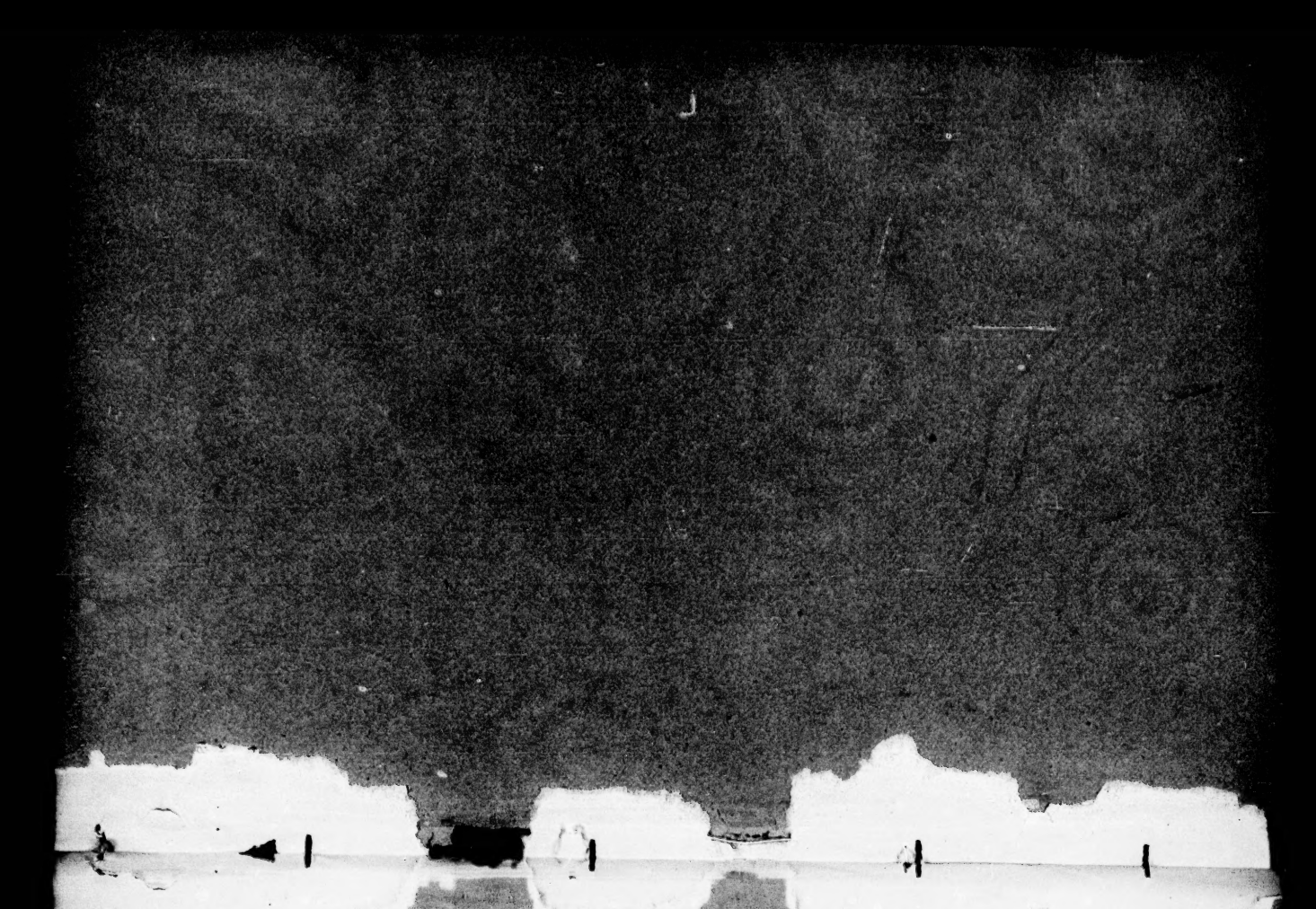
and to but one class of inter-state freight. But if such a burden to inter-state commerce is to be sustained on these grounds, why may not such charges be applied to all roads in the State of Iowa, and to all classes of inter-state freight? And if this be so, what commercial regulation established by Congress for the purpose of facilitating inter-state commerce may not be evaded, and even defied, by private contracts?

Again, suppose that the State of Iowa, for purposes of revenue, had by contract, in pursuance of statutes thereunto provided, entered into an arrangement with the several railroad corporations of the State to handle for them, by means of elevators, all grain going from that State to other States, at a charge of one cent a bushel. Such an arrangement might have been embodied in the charters of the companies when special charters were authorized by the constitution of the State; or provided for in the general incorporation act after the prohibition of special charters by the amended constitution. Would such a revenue measure stand in view of the legislation of Congress hereinbefore noticed? If the elevator mode of handling through-grain was ever a necessity, or even a convenience, at Dubuque, it is not now, and the record shows that it has not been since and even before the first day that the Illinois Central Railroad Company commenced to operate the Dubuque and Sioux City Railroad, and, therefore, such a revenue measure of the State of Iowa would be obnoxious not only to every objection applied by this court to the Pennsylvania tax, but also to the additional one of hindering the operation of an express regulation enacted by Congress. Such an arrangement then, on the part of the State of Iowa, relative to grain passing from the State at Dubuque, and at other points where like circumstances might exist, must, it would seem, share the fate of the Pennsylvania tax.

Is it left for a private contract for private gain to overcome the commercial power of the Constitution? Must the power considered "vital to the prosperity of the Union," "which constitutes the strongest bond of nationality," that has done so much to ad-

vance and develop the country and its material interests, and that has always received at "the hands of the courts and of Congres a construction tending liberally to promote its benificent object, at last yield to individual profit and private gain? To this it comes, if the contract which forms the base of this case is, for the period of fifteen years, to impose its burdens on that part of our inter-state commerce embraced in its terms, in spite of the aforesaid acts of Congress. If such contracts can stand and be enforced by the courts, in the face of such legislation of Congress, then may well be applied here the language of Chief Justice Marshall, in the case of McCullough v. the State of Maryland, "If this be so, then the declaration that the Constitution and laws made in pursuance thereof shall be the supreme law of the land, is empty and unmeaning declamation."

JAMES F. WILSON,
For Plaintiffs in Error.



IN THE

SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, 1873.

No. 234.

THE DUBUQUE AND SIOUX CITY RAILROAD CO., and
THE ILLINOIS CENTRAL RAILROAD CO.,
Plaintiffs in Error.

vs.

ALFRED W. RICHMOND and JOHN JACKSON,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

REPLY OF JAMES F. WILSON, FOR PLAINTIFFS IN ERROR, TO ARGUMENTS OF COUNSEL FOR DEFENDANTS IN ERROR.

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SUPREME COURT OF THE UNITED STATES.

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THE DUBUQUE AND SIOUX CITY RAILROAD COMPANY, AND THE ILLINOIS CENTRAL RAILROAD COMPANY, PLAINTIFFS IN ERROR.

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ALFRED W. RICHMOND AND JOHN JACKSON, DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

REPLY OF PLAINTIFFS IN ERROR TO ARGUMENTS OF COUNSEL FOR DEFENDANTS IN ERROR.

The questions relating to the jurisdiction of this Court in this case were determined at the December Term, 1872.

At that Term defendants in error filed a motion to dismiss the writ of error in this case in words and figures as follows, viz:

"1. The said defendants in error move to dismiss the writ of error in this case because it does not appear from the record that any question was specially set up or decided in the court below which will give this court jurisdiction to revise or reverse said decision.

judicata between the parties, and that plaintiffs in error were estopped, by matter of record, to deny its validity. The decree of the state court, so far as the validity of the contract is concerned, is based on the estoppie, and the estoppie necessarily excluded all consideration of the Federal question sought to be raised."

This point is not well taken, even though the doctrine of estoppie could be applied to this case in any event. The record is firmly against the point. The state court did not apply the doctrine of estoppie to the case at all. The decree discloses these facts as to the Federal question:

1. That the plaintiffs in error claimed in the state court that the constitution of the United States and certain acts of Congress, described by their respective titles and dates of approval, rendered the covenants sued on in this action void.

2. That the state court entertained this defense.

3. That the state court did not dispose of this defense by applying to it the doctrine of estoppie.

4. That the state court denied the claim of the plaintiffs in error, not because it had been once adjudicated, nor because they were estopped from asserting it by reason of any former adjudication between the same parties, concerning the same contract or covenants, but because the court concluded that the constitution and said acts of Congress did not affect said contracts or covenants.

5. That the state court passed explicitly and definitely on the questions presented by the plaintiffs in error, the language of the decree being: "*And it is adjudged that said constitution and said acts of Congress do not in any manner affect the validity or force and effect of either or any of said covenants or either of said contracts.*"

6. That the state court having entertained the defense claimed under the constitution and said acts of Congress, did construe the same; and because of the construction given, denied the sufficiency of the defense, and gave decision against the plaintiffs in error; and that having entertained said defense it could not have

rendered a decree in favor of the defendants in error without first having decided against the claim of the plaintiffs in error. This brings the case within the rule of *Harris vs. Dennie*, 3 *Peters*, 292.

7. That the State court, by express statement in the body of the decree, absolutely excludes the idea that its denial of the claim made by the plaintiffs in error that the constitution and said acts of Congress render "void and of no force the covenants sued on in this action," was based on the doctrine of estopple or *res judicata*.

III.

That a broad, comprehensive and well-defined Federal question is presented in the body of the final decree of the state court, is beyond dispute. That it was presented to the state court and by it decided against the plaintiffs in error is equally clear, and so this court found in passing on the motion to dismiss, as hereinbefore shown. Considering the stress placed upon the doctrine of *res judicata*, and the pertinacity with which an estopple is insisted upon by both of the counsel for the defendants in error, it is reasonable to conclude that they pressed those questions upon the attention of the state court with equal earnestness and tenacity. In fact, the counsel both admit that these questions were brought to the attention of the state court. What follows? Why, that the state court must have resolved these questions adversely to the defendants in error, for the very good reasons which we will hereinafter state; otherwise it could not have proceeded to consider and decide the Federal question stated in the body of the final decree. That the state court was justified in pursuing this course was admitted by counsel for defendants in error in the argument of the motion to dismiss this writ of error, made at the December Term, 1872, of this court. In that argument the counsel said: "We do not claim that the law should be pleaded or stated in the record; the court can find and notice the law at any time." *Mr. Smith's argument on motion to dismiss, p.* 2. This admission is not only true as a general proposition, but is also in

direct accord with the law of the State of Iowa, which says that: "Matters of which judicial notice is taken, need not be stated in a pleading." *Revision of* 1860, *p.* 544, § 2950.

If the state court, when the Federal question presented by this record was brought to its attention, had held that it was not properly raised, or that, being barred by former adjudication, it could not entertain it, and had declined to consider and decide it, and had not decided the question against the plaintiffs in error, there would be some force in the position now assumed by counsel for the defendants in error. Such a record as that would have been very different from the one we are considering. Let us take as an illustration the case cited by Mr. Griffith, that of *Cockroft v. Vose*, 14 Wallace, 5. In that case it was claimed that a certain statute of the State of New York was unconstitutional because it infringed upon the exclusive jurisdiction of the Federal courts. A motion to dismiss the writ of error was sustained by this court. In the opinion of the court it was said:

"The suit before us was an action on a bond given by the owners of the vessel and their sureties to release her when she had been attached in the original proceeding to enforce the lien, and several questions were raised in the defense, none of which seem, from the pleading or anything else in the record, to have been founded on the invalidity of the statute. One of these questions evidently was whether the credit was given to the owner personally, or to the vessel; and another was whether, after the bond had been given and the vessel released, the obligors in the bond were not estopped to deny the validity of the proceeding in the attachment suit.

"Now, if the court decided the case on this latter ground, as it may have done, or on any of the other grounds except the validity of the statute, we have no jurisdiction.

"The inference from the condition of the record, that the court did not decide the statute valid, might receive confirmation from the opinion of that court, if we were at liberty to consider it, for it is there held that the statute is invalid for the very reason given here by the plaintiff in error why *we* should hold it invalid.

"On the whole, we do not find, from anything in the record of this case, that the question relied on here was decided against the right claimed by the plaintiff in error, and the writ is, therefore, dismissed."

This is a fair illustration of the position into which the defendants in error, by the arguments presented by their counsel, seek to force this case. Unfortunately for them the case is against them. It appears from the opinion as above quoted:

1. That several questions not Federal in their character were embraced in the case.

2. That if the decision of the state court was based on either of those questions, or on any ground except the validity of the statute, this court had no jurisdiction.

3. That it did not appear from anything in the record that the question relied on in this court was decided against the right claimed by the plaintiffs in error.

What inference are we to draw from this case? Assuredly this: That, notwithstanding the presence of other questions in the record, even though one of them was estopple, if the state court had in fact decided the Federal question against the plaintiffs in error, and the record so disclosed, this court would have taken jurisdiction.

The present case is very different in its character. If the state court had held that the contract sued on herein could not be questioned by the plaintiffs in error on the ground that that question was *res judicata*, it could not have entertained and considered the claim made that under the constitution and the laws of Congress mentioned the contract was invalid, and denied the same for the reason stated in the decree—"that said constitution and said acts of Congress do not in any manner affect the validity or force and effect of either or any of said covenants, or of either of said contracts." This was why the claim was denied. It is useless for the defendants in error to claim that the denial *might* have been for some other reason. The decree states ground of denial, and it is one which involved directly a construction of

the constitution of the United States and the two acts of Congress referred to.

Rector v. Ashley, 6 Wallace, 142, is quoted by defendants in error. For purposes of convenience we re-quote so much of the opinion of the court in this case as is embodied in the argument of Mr. Griffith. It is as follows:

"It is conceded that one of the points decided by the supreme court of the State against the plaintiffs in error would be sufficient ground for the jurisdiction, if it were the only one on which that court decided the case; but it is claimed that the decree is also based on another and distinct ground, over which this court has no jurisdiction, and that, therefore, we cannot examine the first point. If there *is* this second ground on which the decree may still be supported, although the first were decided in favor of the plaintiff in error, it would be a useless labor to inquire into the correctness of the point which is of Federal cognizance; because, as the ruling of the state court must be assumed to be correct on the other proposition, no reversal could follow if that proposition was sufficiently broad to sustain the decree."

Now, suppose the state court in the present case had decided the Federal question in favor of the plaintiffs in error, and the decree relative thereto had been made to read thus:

"And it is further ordered, adjudged and decreed that the claim of said defendants, that the constitution of the United States, and certain acts of the Congress of the United States, one entitled 'an act to authorize the construction of certain bridges and establish them as post roads,' approved July 25th, 1866, and another entitled 'an act to facilitate commercial, postal and military communication among the several States,' and approved June 15th, 1866, render void and of no force and effect the covenants sued on in this action by said plaintiffs in the contract and supplemental contract, which are the subjects of this action, *be and the same is hereby allowed, and it is adjudged that said constitution and said acts of Congress do affect and render void and of no force the said covenants sued on in this action*," and then should

proceed to enter up a decree in favor of the defendants in error for the sum of $73,186.00 as damages for alleged breaches of said covenants, together with costs, &c. Is there any thing in this record which would sustain such a decree as that? This would be a decision of the Federal question in favor of the plaintiffs in error, but the whole taken together would be a denial of their claim. It will hardly be claimed that no reversal could follow a review of such a decree on account of anything contained in this record. But just such an absurdity as this must be maintained in order to deprive this court of jurisdiction in this case by reason of anything to be found in *Rector v. Ashley*.

It is unnecessary to notice most of the cases cited by defendants in error in support of their positions touching the question of jurisdiction. Some of them have no more relation to the principles involved in this case than they have to the condition of the weather. It is enough to reply to cases (most of them at law,) which have been dismissed by this court on the ground that no Federal question appeared in the record, that in this case the court has already decided that the record does present a Federal question. To cases wherein it has been held that the certificate of a judge of the state court is not, in and of itself, sufficient to originate a Federal question and give this court jurisdiction, our reply is this is not such a case. In this case the Federal question is stated in the body of the final decree of the state court, and this court has decided that that is sufficient.

IV.

We now come to examine the argument of the counsel for defendants in error based on the doctrine of *res judicata*. Both of the counsel who have filed arguments for said defendants claim that this writ of error must be dismissed because the subject matter of the suit is *res judicata*. In order to give this point a footing they both speak of two cases between the parties to this record—of the present case and of a former case at law, which latter case they allege was between the same parties, upon the

same subject matter, and, therefore, claim an application of the doctrine of estopple. We can but express the hope that these representations are the result of inadvertance; and that the accord existing between their arguments is to be attributed to coincidence, and not to purpose. They have both been in this case from the beginning. The record shows their names signed to the original petition. (p. 3). They both know that there has never been but one case; and it must be an inadvertance when they state to this court that there have been two. It is true that unless there have been two cases the doctrine of *res judicata* has no application here; but the counsel would hardly attempt to wilfully mislead the court for the purpose of claiming the advantage of an estopple for their clients. But whatever cause may have led them into the position which they occupy, it is due to truth and fair dealing with the record, that the facts involved shall be made to appear as they really exist, and this we proceed to accomplish.

On page 1 of the record will be found this entry:

"On 23d day of January, 1868, plaintiffs filed their petition as follows:

"In District Court, Dubuque county, Iowa, February term, 1868.

"Alfred W. Richmond, John Jackson, plaintiffs,

vs.

"The Dubuque and Sioux City R. R. Co. and the Illinois Central R. R. Co., defendants."

Following this entry the court will find the original petition of the now defendants in error, to which are attached the contracts sued on as exhibits. (pp. 1, 2, 3, 4 and 5.)

On the fifth page of the record the following entry appears:

"On the 23d day of January, 1868, plaintiffs filed their application for injunction as follows:"

The petition for injunction is then set out at length, commencing:

"To the District Court of Dubuque county, Iowa:

"Plaintiffs represent that they have brought their action by or-

dinary proceeding to the February term, 1868, of this court, against the above named defendants, to recover their damages for breach of certain contracts therein mentioned and set forth, as by reference to their petition on file will more fully and at large appear, which action they allege they are entitled to maintain."

After setting out alleged continued breaches of the contracts sued on, the petition closes with a prayer for a perpetual injunction. (p. 6.)

This action was taken under Section 3798, of the Revision of 1860, of the laws of Iowa, which reads as follows, viz:

"In all cases of breach of contract, or other injury, where the party injured is entitled to maintain, and has brought an action by ordinary proceedings, he may, in the *same cause*, pray and have a writ of injunction against the repetition or continuance of such breach of contract or other injury, or the committal of any breach of contract or injury of like kind, arising out of the same contract, or relating to the same property or right, and he may also, in the same action, include a claim for damages or other redress.

Having commenced the auxiliary proceedings under this section as above indicated, the plaintiffs [redacted] and the district court of Dubuque county, ever afterward treated the cause as a proceeding in equity; and the court will find near the bottom of page 10 of the record the following entry:

"On the 8th day of June 1869, plaintiffs filed their supplemental petition in equity as follows:

"*Supplemental Petition.*"

"A. W. Richmond and John Jackson, plaintiffs,
v.
The Illinois Central R. R. Co. and the Dubuque & Sioux City R. R. Co., defendants. } In Equity.

"To the District Court of Dubuque county:

Plaintiffs complaining of the defendants, supplemental to the *petitions heretofore filed in this cause*," &c.

And again near the bottom of page 12 of the record the following appears:

"On the 17th day of July, 1869, the plaintiffs filed their substitute for the supplemental petition as follows:

"Alfred W. Richmond and John Jackson, plaintiffs,
vs.
The Illinois Central R. R. Co. and the Dubuque & Sioux City R. R. Co., defendants.

"To the district court of Dubuque county, Iowa:

As a substitute for their supplemental petition heretofore filed in this cause, plaintiffs complaining of defendants, say," &c.

The first petition was at law, aided by the auxiliary proceeding prayed for in the petition for an injunction.

On the 28th day of March, 1868, the district court of Dubuque county entered a judgment against the present plaintiffs in error for $3,446.82, and in the same order disposed of the matter embraced in the petition for an injunction, as follows, viz:

"And the petition of plaintiffs for an injunction in *this cause* coming on to be heard, and being fully considered, the court doth refuse the writ of injunction, and doth order that the defendants file with the clerk of this court, semi-monthly reports, giving accurate accounts of all through-grain, transported on the Dubuque & Sioux City Railroad, not otherwise consigned to consignees in Dubuque; and under the control of defendants operating said road, by being expressly consigned to them, or under their control as common carriers of such grain in transit, to points beyond Dubuque."

"To all of which the plaintiffs and defendants except." p. 10.

In the supplemental petition one of the averments is as follows:

"And plaintiffs further aver that defendants have never, in any particular, observed the order of this court to render semi-monthly reports, and defendants do not intend to observe the same." (Middle of p. 11.)

The order here referred to was the one above quoted, which was

rendered March 28, 1868. The supplemental petition was filed June 8, 1869.

The substitute for this supplemental petition, as already shown, was filed July 17, 1869, and its prayer is as follows, viz:

"Wherefore plaintiffs pray that an account be taken of the amount of through-grain which has been passed through Dubuque in violation of said contract and supplement, as aforesaid; and that, for their damages consequent thereon, and for the amount found due by the supreme court, the plaintiffs have judgment; that defendants be decreed to perform said contract and supplement, or in lieu thereof, that plaintiffs have a decree against defendants that, from time to time, during the continuance of said contract and supplement, as shall be fixed by said decree, they account to this court the amount of such through-grain, with liberty to plaintiffs to take issue, from time to time, as to the correctness of such accounts, and to move for judgment, from time to time, thereon, for such sum as may appear due to plaintiffs, from time to time, thereon, and that plaintiffs have such further and other relief as to the court shall seem meet." (pp. 14–15, bottom and top.)

Let it be here noted that the contract sued on bears date August 22, 1860, and was to continue for the full term of fifteen years, or until August 22, 1875. The original petition was filed January 23, 1868, from which time on to the expiration of the contract the now defendants in error proposed to have one continuous proceeding, and yet they talk of two cases to this court, and invoke an application herein of the doctrine of *res judicata*, and pray that plaintiffs in error be estopped to have judgment of the Federal question presented by the record.

After divers unsuccessful attempts on the part of the plaintiffs in error to have the case restored to the law docket, in order that a jury trial might be had of the issues involved, issue was finally joined upon the petition containing the foregoing prayer, and a hearing was had, the result of which will be found on page 22 of the record, commencing at the middle thereof, and is as follows, viz:

"A decree will be entered ordering judgment for plaintiffs for

fifty-seven thousand seven hundred and fifty dollars and cost of suit. This to be in full satisfaction for damages since former judgment to May 1st, 1870, and without prejudice to plaintiffs claim for damages after that date."

"A referee will be appointed to take proofs from the parties, and report damages to plaintiffs from 1st of May, 1870.

"Defendants ordered to keep an account at Dubuque of all through-grain shipped past the elevator, in violation of the contract, and to report weekly to the referee, *until the termination of the contract*, with leave to either party, to move the court for judgment upon report of referee, by giving the opposite party ten days' notice previous to any term of this court.

"Each party to have the right to contest the amount of damages before the referee.

"Each party to have leave to move the court for a modification of this order, for other orders, or an injunction, upon ten days' notice to the other party previous to any term of court.

"The defendants may elect to have damages assessed in gross, by application, with ten days' notice to plaintiffs, previous to any term of court."

Both parties appealed from this order to the supreme court of Iowa. The decree against which this writ of error was issued was the result of this appeal.

The final decree of the supreme court of the State of Iowa, contains this provision, viz:

"That the order of the district court appointing a referee and requiring reports from said defendants to said referee, and granting leave to either party to move for judgment upon the report of said referee, and granting leave to the parties to move said court for a modification of its order, or for an injunction, be, and the same is hereby, reversed and set aside." (p. 44.)

This decree was rendered on February 24, 1872, and put an end to the continuous character of this proceeding, and brought it to a point where it could be reached by a writ of error from

this court. The defendants in error had been persistent in having this regarded as a single, continuous case from the 23d day of January, 1868, down to the rendition of this final decree. According to the theory upon which they conducted their case during this long reach of time, every order, judgment, or decree, relating to the subject matter involved, was at most interlocutory.

After having persisted for more than four years in an unceasing effort to have the case treated as a continuous one; and after securing a decree in the district court that it should stand on the docket as an uninterrupted proceeding until the expiration of the contract, which would not occur until August 22, 1875, it is in exceedingly bad taste for Mr. Smith to state, as he does, on page 2 of his argument, that:

"Had the *first case* been brought here on writ of error, instead of the *second*, there would have been something in this record to raise the question of illegality of contract."

The answer to this is:

1. This is the *first* case, and there is no *second* case in the record.

2. There has been no judgment or decree in the case prior to the one now under review which could have been brought here by writ of error.

a. The law is: "That a *final* judgment or decree, in any suit in the highest court (of law or equity) of a state, in which a decision in the suit could be had, where is drawn in question," &c., "may be examined, and reversed or affirmed, in the Supreme Court of the United States, upon writ of error," &c.

b. The decree, in what is unwarrantably called the first case, was not a final decree, nor was it rendered by the supreme court of the State of Iowa, but by the district court of Dubuque county. (p. 10.)

Nothing can be clearer than the fact that there has been but one case between these parties during the long years through

which it has passed But the counsel for the defendants in error understand full well the necessity of having this court believe that there have been two distinct cases; hence Mr. Griffith returns to the charge on the 30th page of his argument in this wise:

"Having established by the proceedings in *that* action, the validity of the contract and a right to recover damages for the breach thereof, they [the defendants in error] *then* instituted *this suit*, alleging that *since* the commencement of the *former* action, the plaintiffs in error had continued to violate the contract," &c.

"Alleging that since the commencement of the former action"! Now, turn again to the supplemental petition on page 10, and let us see how what they said therein corresponds with this assertion. That petition, as heretofore shown, commences in this language:

"Plaintiffs, complaining of the defendants supplemental to the petitions *heretofore filed in this cause*, say that from and after the filing of the original petition *in this action*," &c.

What petitions had been heretofore filed? One is to be found commencing on page 1, the other on page 5. What "original petition" was filed "in this action"? The one commencing on page 1. No more need be said on that point.

This case has been twice in the supreme court of Iowa. Counsel for the defendants in error claim that the first time it was there the commercial question was settled, and is, therefore, *res judicata*. The record does not bear them out in this assertion, and so they wander off into the opinion of the court for support. But this court has often held that the opinion of the court can not be resorted to for that purpose, as in:

Rector v. Ashley, 6 Wallace, 148, the court said: "We have of late been frequently urged in this class of cases, to look into the opinions delivered by the state courts, to ascertain on what grounds their judgments were based; and the point has been one of some controversy. It is not, however, an open question.—More than forty years ago the same question arose in the case of *Williams v. Norris*, reported in 12 Wheaton. The proposition

was pressed upon the court for the same reason that it is in this case, namely, that by the statute of the State the opinions of the court are required to be filed in writing among the papers in the case. Marshall, C. J., speaking for the court, held that, notwithstanding this act, the opinion of the state court constituted no part of the record, and could not be looked to as the foundation on which this court would take or refuse jurisdiction."

The same doctrine is held in *Gibson v. Chouteau*, 8 Wallace, 314, and is too well settled to require comment.

But when the counsel in spite of this rule resorted to the opinion of the court, what was found? That the question of public policy had been held against the plaintiffs in error on the ground stated in the decree now under review? Not at all; but as Mr. Smith quotes on the 3d page of his argument: "The same objection was urged against the contract *on the ground that it operated to create a monopoly*, when the case was before the court."

That is, when *this* case was before the court the first time—not when the first case was before the court.

If it were not that the decisions last above quoted settle the questions about the opinions of the state court, still there would remain this answer: "They cannot be used to contradict the record; the decree is a part of the record; and the decree in this record states that the claim of the plaintiffs in error was considered and denied because: 'It is adjudged that said constitution and said acts of Congress do not in any manner affect the validity or force and effect of either or any of said covenants, or of either of said contracts.' Simply that, and nothing more. Not because the question had once been decided, and was, therefore, *res judicata*: but for the reason stated by the court in its own decree.

Under the equity practice of the State of Iowa, the supreme court of the state has gone so far as to establish the doctrine that "where the decree in a chancery case is, upon the merits, modified and affirmed on appeal to the supreme court, and the cause remanded for

the district court to enter and enforce the decree, the appellee will be allowed to amend his pleading, asking judgment for the value of property adjudged by the decree to belong to him, but which the opposite party has, instead of delivering up to him, converted to his own use. 31 Iowa, 497.

In this case new matter was introduced into the case by amendment of the cross bill, after final decree had been directed to be entered, by *procedendo* from the supreme court. The court below held that it had no power to allow the proposed amendment. The supreme court reversed the case. Now, if material amendments are allowed under the Iowa practice after a cause has reached this stage, how much greater reason is there for permitting any question which depends upon the application of the law to the facts developed to be made at any time before final determination of the case. Such, doubtless, was the view taken by the supreme court of Iowa of the present case. The Federal question raised, entertained and decided by that court, was in the nature of a demurrer to the whole case. The question could not be raised by demurrer to the petition; for its applicability depended to a considerable extent on the facts which might be developed in the evidence. It could not be presented by special plea; for no such thing is known to the equity practice of the state. It need not be stated in the answer; for it was sufficient when the issues were made up, and the evidence was all in for the plaintiffs in error to say on final argument: "The case, in view of the constitution of the United States and the particular acts of Congress named, will not justify the granting of the relief prayed for," and as an equity cause goes bodily to the appellate court, the same questions can be there raised on final argument that could have been so made in the court below.

Again, if the record disclosed the fact that the claim of the plaintiffs in error, which raised the Federal question in the state court, was denied because it was *res judicata*, the case would now present a different aspect. But the decree does not so state.—The denial of the claim is based on entirely different grounds. It was for the state court to determine whether or no the claim was

barred by any prior judgment or decree between the same parties touching the same subject matter. The decree now under review shows that the question, if presented to that court at all, must have been resolved against the defendants in error, and such resolution does not present a question which could have been brought here under the 25th section of the judiciary act. How otherwise could the state court have gone on to construe the constitution and the acts of Congress under which the claim was made? If the answer of the state court to the plaintiffs in error had been "your claim is *res judicata* and you are estopped from raising it again," it would not have gone on and decided the Federal question, denying the claim made under it on the ground stated in the decree. Was the state court mistaken? That cannot be rectified here. The action actually taken by the state court is an answer to the point made on *res judicata* by the defendants in error. The action of the state court in disposing of that question in a manner not to interfere with its purpose to decide the Federal question, and in passing upon the latter as the decree shows it was passed on, disposes of the point.

In no view which can be taken of this case can *res judicata* be made to answer and dispose of the Federal question. Estopples are odious in law, and "are not admitted in equity against the truth." 1 Serg. & R., 444. There is no case in this record to which *Beloit* v. *Morgan*, 7 Wallace, 619, or the other cases kindred thereto, cited by defendants in error, can be applied.

In addition to what has already been urged in opposition to the applicabiilty of the doctrine of estopple to this case, it may be stated that the character of the Federal question involved cannot be overlooked. It is not a question which spends its force, however it may be decided, on the parties to this record. It is one which, over-reaching them, touches the inland commerce of the country, and affects the public interests. In such cases, though private parties alone were parties to the record, the court has allowed the government to appear in the person of the Attorney General, and care for the public interest on final argument here. Such was the course pursued in the *Legal Tender cases*. Cases

involving such questions are not to be brushed aside by pretences of former cases between the same parties. A construction of one of the most important statutes ever passed by the Congress of the United States relative to inter-state commerce is involved in this cause. We cannot close our eyes to the growing interest which has attached itself to the principles here to be considered. The act of June 15, 1866, was enacted to remedy a grievous evil which had fastened itself upon inter-state commerce, and a cause which rests mainly on it commands a broader consideration than one whose effects commence and end with the comparatively insignificant interests of the private parties to a particular record.

V.

The next point made by the defendants in error is:

"This court will not entertain a point of error assigned at large, on the body of the constitution."

The assignment of error here referred to followed, as nearly as practicable, the language used by the state court in its final decree; and the answer to the objection is supplied by the opinion of this court in *Bridge Proprietors v. Hoboken Co.*, 1 Wallace, 142, on which page the following paragraph will be found, viz:

"It would be a new rule of pleading, and one altogether superfluous, to require a party to set out specially the provision of the constitution of the United States on which he relies for the action of the court in the protection of his rights. If the courts of this country, and especially this court, can be supposed to take judicial notice of anything without pleading it specially, it is the constitution of the United States. And if the plaintiff and defendant in their pleadings, make a case which necessarily comes within some of the provisions of that instrument, this court surely can recognize the fact without requiring the pleader to say in words: 'This paragraph of the constitution is the one involved in this case.'"

The same principle here announced applies to assignments of

error, and, moreover, it is not difficult to understand in this case that the commercial clause of the constitution is the one involved.

VI.

The fourth point made by Mr. Griffith is in these words:

"Supposing, for the sake of argument, that the contract sued on is in contravention of law and public policy; the acts of Congress mentioned in the assignment of errors, give no right to protection from the consequences of a contract made in violation thereof."

In support of this point, *Walworth v. Kneeland*, 15 Howard, 351, is cited. In the case cited private parties had combined together to defraud the government, by preventing certain public lands from being sold for more than one dollar and twenty-five cents per acre. They entered into a contract for that purpose, the resulting spoils to be divided between them. It was an unquestioned, premeditated fraud. It succeeded to the extent of securing title to certain lands. The title was vested in Walworth. His partner in the fraud conveyed his interest in the land to another party. Walworth refused to recognize the contract and also refused to convey to the assignee. Suit was brought to compel conveyance. Walworth sought to defend on the ground that the contract was fraudulent and in violation of certain acts of Congress. Defeated in the state court he brought the case here by writ of error. The state court had held that such a contract would be void, but also held that Walworth had failed in his proof. Walworth could make no claim in the state court which would entitle him to the protection of the 25th section of the judiciary act, and so this court held. He was trying to use this court to enforce an admitted fraud to his own advantage, he being a chief party to the fraud.

There is no pretense that the present plaintiffs in error have been guilty of any fraud. They made no claim in the state court based on a fraud. Their refusal to perform the contract sued on was not for their personal gain; for the testimony of Farley, which stands undisputed as to this point, is: "As a matter of

course, about that time the Illinois Central Railroad reduced their rates of transportation in proportion to the amount saved between shipping through the elevator and the means which they had adopted," &c. (p. 39.) When they were brought into the state court to answer a petition which claimed that all through-grain transported over their railroads should be unloaded at Dubuque, run through the elevator, suffering delay and wastage at a specific charge of one cent per bushel, the claim which they presented, as disclosed by the record in this cause, when considered in the light of its facts and the law applicable thereto, and which entitles them to come here under the 25th section of the judiciary act, was: "Our railroads are operated by steam: we are authorized to connect the two roads, which we did for a time by our ferry-boat, and since by means of the railroad bridge at Dubuque: we are giving to this through-grain a continuous line of transportation to the place of destination: having made our connections in this way, it is our duty as common carriers of this through-grain, to afford to the shippers thereof all of the advantages of these connections, and of this through line: the contract which requires us to unload all of said grain at Dubuque, and run it through the elevator, is contrary to the public policy established by the act of June 15, 1866, of July 25, 1866, and of the commercial clause of the constitution of the United States: that our lines of road being connected as aforesaid, thus bringing us within the terms of the said act of June 15, 1866, we cannot comply with the contract, and at the same time conform to the policy of the law: that the two being in conflict we regard the contract in this respect void, and are pursuing what we understand to be our duty under the law, and this being the case, it was our right and privilege to transport the through-grain over our roads, boats and bridges, as we have done."

This is the claim which was presented to and passed upon, and denied by the supreme court of Iowa, as it is the one that is presented to this court by the record now before it. It requires no reflection to distinguish the distinction between this case and the one cited by defendants in error, and of *Ullell and others v. Du-*

vidson, 7 Howard, 769. A compliance with the contract by the plaintiffs in error, after the connection of their roads by boat or bridge, or in any manner authorized by the act of June 15, 1866, would render them liable to innumerable suits by shippers of through-grain for damages growing out of the unnecessary delays, wastage, and the needless one cent per bushel. This interest of the public is constantly overlooked by the counsel for defendants in error.

We are dealing with the railroads belonging to the plaintiffs in error. If their roads are within the terms of the act of June 15, 1866, by reason of the connections they have made, it matters not how many other railroads centre at Dubuque, or whether they are within or without the law. Nor will we discuss the question whether that act is mandatory upon railroad companies who have not established connections so as to form continuous lines of transportation for freight from state to state. Nor still the case of "a railroad in one state having its terminus at a point on the state line, where three other roads in the adjoining state converge," as put by Mr. Griffith in the discussion of his 7th point. We can only say that he does not show a very enlightened appreciation of the question he discusses when he says, referring to our opening argument: "But if the learned counsel for the plaintiffs in error be correct in his meaning of the word 'authorized,' as used in the act referred to, the former company would be under legal obligation to connect their road with one of the three, so as to form a continuous line, and thereby destroy all competition between the three roads for the carrying trade of their line, and lose all commercial benefit derived from competition."

We are not to be enticed away from the case before us. What we said in the opening argument was: "Whatever may be said as to the want of ability of other railroad companies to conform their action to said policy because of the limitation contained in the last clause of the first section of the act, it can have no effect in this case; for the plaintiffs in error, were, as has been shown, in position to put into practice the rule of policy prescribed by the act, and have done so from the beginning. To them it was a

rule obligatory." It is enough for us to know that the railroads of the plaintiffs in error come within the terms of the act. Their roads were operated as one continuous line of transportation, connected at Dubuque, first by boat and then by bridge, the whole being under one management and direction. And because of these facts, and for the reason that the roads by means of said connections were operated as an unbroken line, we assert that the roads of the plaintiffs in error are within the terms of the act, and that, as to them, the act is a rule obligatory. They have obeyed the rule, and this obedience is the ground of complaint against them by the defendants in error.

We care nothing about what the two counsel for the defendants in error have said about other railroads at Dubuque. If there are a thousand there seeking to get across the Mississippi river by means of the bridge erected under the act of July 25, 1866, they are secured in that right by the terms of the act. Nor do we care for all that they have said about the great usefulness of the elevator of their clients, or of the desirability of having grain passed through, or stored in it, that may be seeking a market by way of steamboat transportation, or over any of the many roads of which they speak. There is no limitation on the rights of any person to consign grain to the elevator to their hearts' content. All this has nothing to do with the "through-grain" involved in this case—that is, grain delivered to the plaintiffs in error in the state of Iowa, to be transported to points beyond the said state. This grain, we say, they had the right, under the act of June 15, 1866, to carry from point of shipment to places of destination, without unloading it at the elevator of the defendants in error. That is the grain which is in dispute here, and not that delivered to some other railroad company, or to steamboats, or consigned to the said elevator, or directed to be treated in some manner other than over the railroads of the plaintiffs in error.

VII.

The amendment to the 21st Rule requires plaintiffs in error to file with the clerk:

"A concise abstract, or statement of the case, presenting succinctly the questions involved, and the manner in which they are raised."

This rule has been complied with by the plaintiffs in error in this case; and the statement of case so filed has not been controverted by the defendants in error.

The rule further provides with reference to counsel for defendants in error that:

"His brief shall be of like character with that required of the plaintiff or appellant, except that no * * * * * * statement of the case [is required] unless that presented by the plaintiff or appellant is controverted."

Concerning this rule the court, in *Portland Company v. United States*, 15 Wallace, 1, said that:

"The necessity of strict compliance with these rules, especially in view of the greatly augmented business of the court, is evident. That counsel might have full notice of the rule, it was required to take effect on the first day of the present month of January, and the clerk was directed to have printed copies made of the rule as amended, and send one copy to each of the counsel in all cases pending and not yet argued. In the case before us, this rule has been totally disregarded on the part of the appellant. We shall, therefore, in this case—dismiss the appeal."

In view of this action of the court, we presume that it is fair to conclude that there is no disagreement between counsel for the plaintiffs in error and counsel for the defendants in error concerning the statement of the case filed by the former. The "abstract of record and statement of case," filed by counsel for defendants in error, it will be observed by the court, is confined to the development of a single question, which we have heretofore noticed.

There can be no doubt that the facts set forth in the statement of the case by the plaintiffs in error are sufficient to bring the case within the provisions of the acts of Congress of June 15, 1866, and July 25, 1866, and the commercial clause of the constitution.

It is true that the said statement of case does not claim in words that the railroads of the plaintiffs in error are operated by steam, but it does state what is equivalent thereto. In this connection we will notice the fifth point of Mr. Griffith's argument. He says:

"Whether the act applies to a given case or not, is a mixed question of law and fact. Whether the roads of plaintiffs in error are operated by steam or not, or whether they were so operated at the time of the breach of the contract, is a question of fact." He claims that this fact was not proved.

The counsel is here met with an answer of his own creation. He could not present his case to the state court without proving the fact which he now seeks to controvert. His case was founded on written contracts. When he filed his original petition in the state court he did at the same time what the law of the state required him to do—he attached to his petition, and made parts thereof, copies of the contracts on which he relied. "Exhibit C" will be found on pp. 4–5 of the record. It is the lease of the Dubuque and Sioux City Railroad to the Illinois Central Railroad Company, and it contains this clause: "That the said party of the first part, for and in consideration of the rents, covenants and agreements hereinafter mentioned, has let and leased, and by these presents does let and lease unto said party of the second part, for and during the term of twenty years, commencing upon the first day of October, A. D. 1867, the Dubuque and Sioux City Railroad, including tracks, depots, right of way, bridges, turn-tables, side tracks, switches, water-tanks, depot-grounds as now occupied, cars, engines, *locomotives*, warehouses, elevators, and all other things, real or personal, used or to be used in and about the operation of said railway," &c.

These facts given in evidence to a chancellor, or to a jury, would justify him, or them, in finding that the railroad in question is operated by steam; for they describe such a road and no other. Worcester defines the word "locomotive" thus: "A steam engine supported on wheels made to draw or propel a train of railway carriages, and traveling with the load which it carries."

The meaning of words in the vernacular language need not be proved. 1 Greenleaf's Evidence, § 5.

Then, so far as the Dubuque and Sioux City Railroad is concerned, it undoubtedly is a railroad operated by steam.

In the statement of the case filed by the plaintiffs in error, it is alleged that:

"The plaintiffs in error own and operate the Illinois Central Railroad, which is situate in the state of Illinois, with its western terminus at Dunleith; and operate under the above lease the Dubuque and Sioux City Railroad, which is situate in the state of Iowa, with its eastern terminus at Dubuque. The two roads are connected by the Dubuque bridge, and being under the same management and control, practically constitute one through line. Prior to the construction of the said bridge the connection was made by ferry-boats, loaded cars being then, as they are now, transferred without any re-handling of freight. The term 'through-grain,' as used in the contract sued on, means grain consigned to Chicago, or points east of Dubuque. Large quantities of 'through-grain' were shipped over the Dubuque and Sioux City Railroad, and without being delivered to the elevator for handling, were passed through Dubuque without unloading; and on to their destinations in Illinois and beyond, in the same cars into which the grain was originally loaded—there being no handling of such grain between the points of shipment and the places of destination."

These facts are all sustained by the several petitions of the defendants in error in the state court, and the testimony of W. F. Blake (pp. 34, 35, 36 and 37) and of J. P. Farley, (pp. 37, 38, 39 and 40,) and are not controverted by the statement of case filed by the defendants in error. Reasonable deductions drawn from facts admitted and from facts proved, are as much evidence as the facts themselves. There are presumptions arising upon the facts proved. "This class of presumptions embraces all the connections and relations between the facts proved and the hypothesis stated and defended, whether they are mechanical and physical, or of a purely moral nature." 1 *Greenleaf's Evidence*,

§ 48. The Dubuque and Sioux City Railroad is a road operated by locomotives, hence is operated by steam. It is under the control of the Illinois Central Railroad Company. Cars brought over it by the latter company are moved through Dubuque, taken across the Mississippi river, and sent on to their destination without being unloaded or their freight molested. Hence the reasonable deduction is that the Illinois Central Railroad is operated by steam. It does the same kind of work that is done on the Dubuque and Sioux City Railroad, uses the same cars, and continues the business of freightage commenced on the latter road until the freight reaches its destination unbroken in bulk, and that it does so is the ground of complaint upon which the defendants in error based their suit.

Aside from these considerations there remains the great fact that the most important and generally used means of inter-state commercial communication is the railway system of the country. This is a matter of public history affecting the whole people, of which the court will take judicial notice. 1 *Greenleaf's Ev.* 12th Ed. p. 8. "The principle on which such notice is taken, is the universal notoriety of the facts in question." Ibid. vol. 4. p. 231. It will hardly be claimed that there is an intelligent person in the United States who does not know that this system of inter-state communication does exist, its character, and mode of operation. The courts will also take judicial notice of geographical facts; as that the city of Cairo is in the southern extremity of the state of Illinois; that Chicago is in the northern-eastern part of the state, and that Dunleith is in the north-western part thereof; and there is not an intelligent person in the country who does not know that these several points are connected by the Illinois Central Railroad, making an aggregate of over 700 miles of continuous rail connection, as a part of the great general system of the country. Nor is there any one so stupid as not to know that this great part of the integral system is operated by steam. This is a part of the character of the great fact which plays so important a part in the immense inland commerce of the country, and is universally known. This is no

straining of the rule relative to judicial notice, as is the effort of Mr. Smith in his argument for the defendants in error (p. 11) to induce this court to take such notice of what he volunteers as a fact—"that very large shipments of grain from Dubuque have been made to foreign countries;" and in connection with which he quotes from the testimony of the witness Farley: "we took grain right along in competition with boats, and always have done it to Chicago, Cairo, St. Louis, winter and summer." It is scarcely necessary to suggest that such competition could not have existed upon a railroad not operated by steam. It would be most difficult, not to say impossible, for a railroad not so operated to engage successfully in competition with boats propelled by steam, and possessing in addition the advantage of the low rates charged for water transportation.

A question kindred to the foregoing one is raised by Mr. Griffith under the same point in his argument that we have been noticing. He says: (p. 29) "Unless a continuation of the two roads was made so as to form continuous lines, it is not claimed that the contract became annulled by the acts. Here is another question of fact, on the determination of which depends the applicability of the facts to the contract."

We say in answer to this:

1. That: "Matters of which judicial notice is taken, need not be stated in a pleading." Revision, Laws of Iowa, 1860, p. 544, § 2950.

2. That the courts take judicial notice of the constitution (1 Wallace, 116) and of public statutes. (1 Greenleaf on Ev. 12th Ed. p. 7. § 5.

3. That the act of June 15, 1866, authorizes railroad companies to "carry upon and over their roads, *boats*, *bridges* and *ferries*, all passengers, troops, government supplies, mails, freight, and property on their way from one state to another state, and to receive compensation therefor, and to connect with roads of other states so as to form continuous lines of transportation of the same to the place of destination." Hence:

a. When the evidence shows that the cars which come in with grain over the Dubuque and Sioux City Railroad were placed on ferry boats of the Illinois Central Railroad Company, and transported across the Mississippi river to be forwarded over the road of the latter company, this is a connection between the two roads within the terms of said act, and the subsequent connection by bridge works the same result.

b. The testimony of W. F. Blake (pp. 34–35) shows that the identical cars which came in over the Dubuque & Sioux City Railroad were so crossed, also testimony of J. P. Farley (pp. 37–38) shows the same, and further, that "the ferry-boat was managed by Mr. Beck, agent of the Illinois Central Railroad company, at Dunleith."

c. The same testimony shows that since the completion of the bridge it has been used by the Plaintiff's in error to connect the two railroads, and that cars coming in from the interior of Iowa have been passed from one road to the other, thus securing to them continuous transportation to place of destination.

4. From the foregoing we arrive at this conclusion: The state court took judicial notice, as it was bound to do, of the constitution and the acts of Congress mentioned, and it was not necessary to state them in the pleadings. They were as fully before the court as though stated specifically in the pleadings. The evidence discloses all of the facts necessary to bring the plaintiffs in error within the terms of said acts of Congress, hence a decree in their favor of the state court would have run *secundum allegata et probata*, as the counsel for defendants in error claim it should.

Another answer to this, as well as to all like questions raised by the counsel for the defendants in error, is: That this is a proceeding in equity; that on the final hearing of such a proceeding it was the right of the plaintiffs in error to claim that, taking the whole case together as presented by the pleadings, and the evidence and presumptions arising thereon, it was insufficient in law to entitle the defendants in error to the relief prayed for; that in

thus challenging the sufficiency of the case the plaintiffs in error opposed to it the commercial clause of the constitution of the United States, and two acts of the Congress of the United States, as shown by the final decree of the state court; that the state court approved the right of the plaintiffs in error so to do, by allowing the defense thus presented to be made, to be argued, to be considered by itself, to be formally, fully and definitely adjudged upon the questions and principles involved in the constitution and said acts of Congress, and not upon any thing extraneous thereto. Undoubtedly this course of the state court was correct; for the final hearing involved all that there was in the case, including matters of which the court would take judicial notice, as well as those things which appeared on the face of the record. But suppose this matter were not as we claim, and that the state court made a mistake in allowing the defense to be made in this way, in what can this avail the defendants in error? At most it would be an error by the state court as to the mode of procedure and practice under the state laws. Such an error can not be remedied here, nor can it be presented as an answer to the Federal question which this record presents. The decree rendered by the state court shows on its face that the points here discussed must have been resolved in favor of the plaintiffs in error. If this had not been the case the state court would naturally have based its denial of the claim of the plaintiffs in error on the ground that the pleadings were insufficient to base the claim upon. This question lay squarely across the path of the state court in its advance towards the Federal question. If the record was in such condition that the Federal question could not be raised, and the state court had so held, it would have disposed of the case so far as getting it into this court by writ of error is concerned. For it would have resolved the issues of the case, not upon a Federal question, but upon one involving only matters of pleading and practice under the laws of the state. The state court pursued a different course. It entertained the Federal question, and construed the constitution and acts of Congress brought to its attention. Hence it must first have determined that the Federal question could be raised upon the pleading and record as present-

ed to it; and this being a question arising under the state practice "the state court must be assumed to be correct" as to it. *Rector v. Ashley, Supra.*

VIII.

We do not care to say anything further touching the 6th and 7th points made by Mr. Griffith. All that he has said in support of them that a lawyer ought to say to this court, we have answered under one or another of the foregoing divisions of our reply. His flippancy we do not care to notice. What he says under the 8th point might as well be applied to any other case, so far as anything in this record shows, except so far as he quotes from the opinion of the supreme court of the state of Iowa, delivered when the decree which is now under consideration was rendered. And while that opinion can not be used here to ascertain the reasons which induced the action of that court, nor to aid in raising a Federal question in the case, the quotation made serves to show that the counsel has inadvertantly crossed the path of his associate, who, in his argument, asserts that: "The interstate commercial point came into the record by stealth in the appellate court." This point having been so amply treated by the state court, as shown by the quotation referred to, the decree rendered, disclosing the fact that it was made, fully considered, and the reasons for holding it against the plaintiffs in error, was, in these several respects, a natural result.

Mr. Smith, on page 14 of his argument, refers with evident good feeling to *Osborne v. Nicholson*, 13 Wallace, 658, and seems to believe that he derives support from it relative to his assertion of the inviolability of the contract upon which this case rests.—It does not seem to have occurred to him that the contract in that case might have been rendered as utterly worthless by an exercise of the power of Congress to pass an uniform system of bankruptcy, as his clients' elevator contract for handling through-grain was by an assertion of the power to regulate commerce among the States.

A little further on on the same page he gives evidence that light was breaking in upon his mind touching the possibility that, after all he had said before, the legislation of Congress and changed circumstances, might, to some extent, affect the contract which he has so stoutly defended. Hence he says:

"It seems but fair and exact justice in this case, even under the theory that the contract was in some part avoided by subsequent legislation and partially changed circumstances, that the railroad company should be held liable on their warranty, because in compliance with the terms of the contract the defendants in error had gone on and expended large sums in erecting buildings, &c., and materially changing their condition," &c.

Now, if the court will turn to the original contract between the parties (p. 3) this clause will be found:

"4th. That, at the expiration of fifteen years, the Dubuque elevator will, at the option of the said railroad company, accept of and enter into a renewal of this lease exactly on the same terms as this lease, or accept in full payment for their buildings, machinery, and property necessary for the receiving, storage, delivery, and handling of grain, and the conducting of such business, the amount for which the same, by an appraisal, may be ascertained to be worth." This takes care of their expenditures, and returns their money together with such increased value of the property as may be ascertained by the appraisal. This contract, in no particular, is affected by the claim of the plaintiffs in error. It is the original contract between the parties; and embraces every thing for which they ever did contract, except the through-grain arrangement, which was made at a subsequent time. This supplemental contract about through-grain, is the only thing to be affected by this cause. As we remarked in our opening argument: "The effect of the act of June 15, 1866, is to render invalid this provision of the supplemental contract. *In every other respect the defendants in error are left just where they were content to place themselves by the original contract.*"

JAMES F. WILSON,
For Plaintiffs in Error.

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1873.

NO. 234.

THE DUBUQUE & SIOUX CITY RAILROAD COMPANY and THE ILLINOIS CENTRAL RAILROAD COMPANY, Plaintiffs in Error,

vs.

ALFRED W. RICHMOND and JOHN JACKSON.

ARGUMENT OF PLATT SMITH, COUNSEL FOR DEFENDANTS IN ERROR.

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vs.

ALFRED W. RICHMOND and JOHN JACKSON. Defendants in Error.

In Error to the Supreme Court of the State of Iowa.

This is the second action brought for a breach of the contract sued upon. The action was commenced June 8th, 1869. (See the petition, commencing at bottom of page 10 of the Record.) The Record also contains the proceedings in the first action, commenced on the 23d of January, 1868.) See pages 1 to 10.) In the second action both parties relied upon the first as a bar, as an estoppel. The defendants therein moved the court to enter judgment against themselves. See near bottom of page 15 of Record. The judgment was entered for $4,365.14, and they pleaded the same as a bar in their answer. Page 17, 3rd paragraph of Record. This final judgment was entered

February 22d, 1870, while this case was pending in the same court. About one year afterwards the present case was decided. Record, pp. 20 and 21. A copy of the judgment was put in evidence. The answer of defendants, page 7 of Record, in the 3d paragraph, states in regard to the contract sued on that it "was made *in restraint of general commerce, in contravention of law and sound public policy, and creates a monopoly which is detrimental to the public interest*, hence is illegal and void. And in the 4th paragraph that "the Railroad Company had no right to make the contract." Hence it will be seen that the question now for the first time sought to be raised in the present case (in the argument only) was actually specially pleaded and tried in the former case. The Supreme Court, in the 26th Iowa, 201, expressly overrules this defense. The decision was made at the December Term, 1868, more than two years after the passage of the acts of Congress relied on in this case. The act to facilitate commerce, and the Constitution of the United States, were then, as now, part of the law of the land. But it may be said that plaintiffs' counsel did not at that time know as much about the Constitution and laws of Congress as they do now, and it may perhaps be admitted that they will yet learn something of these matters.

Had the first case been brought here on writ of error, instead of the second, there would be something in this record to raise the question of illegality of contract. But in the present case plaintiffs in error set up nothing of the kind. Their answer is: First, denial; second, payment; third, former case in bar. Record, page 17. It is evident then that the plea of a void contract was abandoned as having been fully and finally adjudged against them. There is nothing in the pleadings or evidence of this case to show that such a question was raised in the District Court. The opinion of the district judge will be found on pages 21 and 22 of the Record. The case was removed by appeal to the Supreme Court, and the report will be found at page 422, XXXIII. Iowa. Chief Justice Beck, in delivering the opinion, says, page 498:

"It is argued with great confidence and at great length, that the contract in this case is in conflict with public policy, and therefore void. The same objection was urged against the contract on the ground that it operated to create a monopoly, when the case was before the court. We held the contract valid. XXVI. Iowa, 191. The decision then made as to the question involved, must be considered final." And the court might have added that the decision in the former case was final, not only as to what was specially set up and pleaded, but would be so as to anything that might or could have been set up in such former case. Upon this point authorities are abundant. In Heichew vs. Hamilton, IV. G. Greene, page 319, Hall, J., uses the following language: "The record of former recovery was pleaded by plaintiffs by way of estoppel, and had the effect upon the record to estop the defendant from denying every fact in issue between the parties, except the breach of the contract and the amount of the damages." The former judgment is conclusive as to what might have been tried, as well as to what was tried.

Freeman on Judgments, 212.
Harris vs. Harris, XXXVI. Barb., 38.
Clemens vs. Clemens, XXXVII, N. Y., 59.
Campbell vs. Ayers, I. Iowa, 261.
Whitaker vs. Johnson County, XII. Iowa, 595.

The last case above referred to is especially in point. See the numerous authorities there cited. This doctrine was carried much farther in the case of Chicago vs. Robbins, II. Black, 418, than is necessary to our purpose. In that case the defendant had been told by the attorney for the city that a suit was pending against the corporation for injuries to one Woodbury, in consequence of an area having been left open by Robbins, and it was held that the judgment against the city was conclusive upon Robbins as to the facts, although he was not a party to the suit. Same case, IV. Wallace, 672.

In George vs. Gillespie, 1 G. Greene, 421, the judgment was held conclusive when given in evidence, without hav-

ing been specially pleaded. The great constitutional and commercial question was specially set up and tried in the former case; and that case is the one that should have been brought here instead of this. This court has no jurisdiction to review the question of a former case in bar decided in the Supreme Court of a State. This case presents two questions: *First*, The question of former case in bar, which is essentially a non-federal one; and, *second*, the federal commercial question, raised only in argument, and which, indeed, is not properly before this court. The first question, the non-federal one, is sufficient to oust the jurisdiction of this court, even though the federal question were well set up and apparent on the face of the record. This proposition is so well established that it is only necessary to state it, and refer generally to the following cases:

Recter vs. Ashley, VI. Wallace, 147.
Kennebec Railroad vs. Portland Railroad, XIV. Wallace, 23.
McGuire vs. Tyler, VIII. Wallace, 650.
The Railroad Co., vs. Rock, IV. Wallace, 177.
The Ins. Co. vs. The Treasurer, &c., XI. Wallace, 204.
Lawler vs. Walker, XIV. Howard, 149.
Commercial Bank vs. Rochester, XV. Wallace, 639.
Gibson vs. Chouteau, VIII. Wallace, 314.
Klinger vs. Missouri, XIII. Wallace, 257.

The non-federal question was not actually decided in the last case cited, but the record showed that such question *might have been* the ground on which the state court rested its decision.

II. No Federal question of Inter-State Commerce appears on the face of the Record

In every action there should be both plaintiff and defendant, and the pleading and evidence in the *nisi prius* court should be such that the attention of the defendant is called to the very statute that he is supposed to have violated. For instance: Richmond and Jackson, in this case, should have had their attention directed to the acts of Congress, and to the policy of inter-state commerce which

they are accused of violating, and the opportunity so afforded them to show the surrounding facts and circumstances that would have thrown light upon the subject, and enabled the court to see whether or not the statute or policy of commerce had been violated, whether the contract was really in contravention of them or not. When so viewed, it might and undoubtedly would have appeared that instead of being an obstruction to commerce the contract was an efficient aid thereto, well adapted to facilitate it. Some reference should have been made to the part of the constitution or federal law which is supposed to be drawn in question. In the present case the objections now sought to be raised were apparently abandoned in the District Court. There is not a word of evidence in the record on this subject, nor was the question in any manner discussed in that court; and yet it is supposed that there was lurking somewhere beneath the surface, an implied accusation that the defendants, Richmond and Jackson, had violated the constitution and laws of the United States, and the commercial policy of Congress. I suppose this implication must be considered as a kind of outgrowth of the plea of payment, which plea was possibly put in to divert the attention of Richmond and Jackson from the great constitutional, inter-state implied allegation. If these corporations had intended to deal fairly with their opponents, they would have alleged, for example, that their iron tracks were connected, making a through line of transportation, and that their road was operated by steam, as the law requires, thus affording opportunity for taking issue upon these points. Nothing of the kind was done. The fact is plaintiffs in error were demoralized by the defeat in the former case, or possibly did not know their business when the case was tried in the District Court, and were only struck with the idea as an afterthought, on appeal. But it was the issues in the District Court, that were appealed. It is not competent to insert new issues of fact in an appellate court, nor has any body attempted to make any such issues, except in argument. The record and evidence are clear of every-

thing of the sort. But it may be truly said that the question was raised in a speech in the Supreme Court of Iowa, and that it appears in the end of the judgment of that court that such a point was made and overruled. The record does not show that it was involved in the issues,—only that such an exemption was "claimed by defendants," and overruled by the court. I suppose that such a recital in the judgment would be equivalent to a certificate of the judge. It is the insertion of extrinsic matter in the judgment. In Parmelee vs. Lawrence, XI, Wallace, 36, Nelson, J., says: "The office of the certificate, as it respects the federal question, is to make more certain and specific what is too general and indefinite in the record; but is incompetent to originate the question, within the true construction of the 25th section. Motion to dismiss granted." Now, if the certificate can not originate the question, then where did it originate? Either there is no such question in the record of the case, or it must have originated in and drawn its very existence from that certificate and the argument of counsel. There is not a syllable of it in the pleadings and evidence Richmond and Jackson are accused of grave offenses against the constitution and laws of Congress; and it is supposed that their property has been taken, that their covenants have been wiped out and annulled by certain Acts of Congress. And all these absurd consequences flow from an implied and imaginary allegation, and an afterthought suggested in the appellate court. And this court is asked to infer the facts, without proof, in reviewing the case on writ of error, wherein question of fact cannot be determined.

This court has progressed further than I have been advised of if such things can be done. In the case of Mason vs. Messenger, X Wallace, 507, an objection was made in the court below to the admission of certain records because the law under which the proceedings were had was unconstitutional and void. The certificate of the Supreme Court of the State certified "That on the final hearing the validity of the partition law, of the 4th January, 1839, was drawn in question on the ground that it was in con-

flict with the Ordinance of 1787, the Constitution of the United States and the treaties and laws thereof." The case was dismissed because the constitutional objection was too general to be noticed under the 25th section of the Judiciary Act.

In the case of Farney vs Towle, 1 Black, 350, the court held that the specific clause in the constitution must be referred to. This case was dismissed because of a non-compliance with that requirement.

In Hoyt vs. Shelden, 1 Black, 518, the court held a similar doctrine, refering to Maxwell vs. Newbold, XVIII Howard, 515. But it would seem to be unnecessary to cite authorities to prove that questions of fact bringing the violators within the law should have been alleged and proved in the court below. These authorities seem to require the attention of the parties and court to be drawn to the particular laws violated.

III. The distinction between a Government Tax and Private Compensation.

The Plaintiff in error has labored to prove that Congress has a right to regulate commerce, and has cited numerous authorities to show that a state has no right to levy and collect taxes in opposition to the federal commercial laws. I am inclined to think that this position is correct. It seems to be maintained by a great number of decisions of this court; such as the Passenger cases, Brown vs. Maryland, Crandall vs. Nevada, and many other cases cited, where the main question was whether a state law levying such tax is valid. It is sufficient to say that such state legislation is invalid, and must yield to federal legislation. A case of this kind is reported in XV Wallace, 232, Reading R. R. Co. vs. Pennsylvania. If Richmond and Jackson were a public municipal corporation, levying and collecting taxes for the support of themselves, these cases would be in point; but unfortunately for plaintiffs in error, they are private proprietors, asking compensation for services,—a thing as different from tax-

ation as night is from day. If counsel for plaintiffs in error would favor us with a couple of dozen decisions where this court has decided that the taxing power of a government is exactly co-extensive with the rights of individuals, and that all railroads operated by steam in the United States can repudiate their contracts for supplies furnished and services rendered, then the plaintiffs in error will have some authority to support their position. If they can do no better, let them cite the decision of a Justice of the Peace to that effect. The Acts of Congress upon which they rely were passed more than seven years ago; the act to facilitate commerce applies to all railroads operated by steam, and if it has the effect to enable them to so repudiate their just liabilities it would seem that there ought by this time to be found some reported cases where the courts have so held; but not one case of the kind has been produced. In the case of The Reading Railroad vs. Pennsylvania, XV Wallace, 278, the state undertook to play the part of a private proprietor, and call the tax compensation; but the subterfuge was too apparent. This court draws a clear distinction in that case between taxes and compensation. And it will be well not to lose sight of this distinction, in the consideration of this case.

IV. Constitutional Construction.

The Constitution of the United States, Art. I, Sec. 9, Clause 5, provides that "No preference shall be given by any regulations of commerce or revenue to the ports of one State over those of another." This court is bound to take judicial notice of ports of entry.

The United States have repeatedly made appropriations to improve the navigation of the Mississippi river. And we might probably take it for granted that the court will take notice of the fact that this river is navigable.

Penna. vs. Wheeling Bridge Co., 13 Howard, 561.

Dubuque was made a port of entry and delivery August 3d, 1854. See U. S. Statutes at Large, 10th Vol., page 346,

and appropriations have been made for improvement of the harbor at that point. U. S. Statutes at Large, 10th Vol., page 60.

If the act of Congress is to receive a construction that will make it imperative and mandatory, as contended for by plaintiffs' counsel; if the railroad company is bound to keep the grain in the cars on the iron track, receipted and billed for Chicago, and labeled: "Not to go through Dubuque elevator," as per imperative and mandatory command of Supt. Farley. See Record, page 39, at top; then that clause of the Constitution that provides that no preference shall be given to the ports of one State over those of another will be abolished. The port of Dubuque will be wiped out and the port of Chicago will, in violation of the Constitution, have the preference, so far as the shipping of grain is concerned. The act of Congress does not in terms do more than authorize and permit; and the courts should not attempt to torture or stretch the act so as to make it mandatory and imperative, when such a construction would end in violating the above mentioned clause of the Constitution. The Supreme Court of Iowa decided that the mandatory order of Farley, superintendent of the Illinois Central Railroad, and the other evidence relating to the same subject matter, "clearly estab lishes that such directions were given by the procurement of defendants themselves, with the obvious intent of defeating the plaintiffs in this action, and of excusing future breaches of their agreement. Defendants cannot be permitted to take advantages of the directions of shippers obtained by such collusive and unfair interference on their part." XXXIII. Iowa, 498. It will be seen by the foregoing that now and then a glimpse of the surrounding circumstances appears in the record, notwithstanding no issue was made involving the commercial, inter-state questions. If the pleadings in the case had set up the special point, and directed attention to the acts of Congress and the Constitution, we would have been able to show facts far more potent than anything which accidentally happens to be in the record. The inter-state, commercial

V. The Acts of Congress and the contract do not conflict.

The plaintiffs in error contend that the act to facilitate commerce is imperative; that it is the bounden duty of the railroad company to carry a car load of wheat from Sioux City to Chicago, on a continuous, unbroken line of railroad operated by steam, and that the act properly construed, is mandatory and imperative. The author of that argument, I believe, was Chairman of the Judiciary Committee in Congress when the act was passed. He shows in his printed argument that the act was intended to be remedial; that there was a monopoly to be broken up; and I presume that he might have added with perfect propriety that the steamboat interests of the West were continually waging war upon railroad bridges over the Ohio and Mississippi rivers, and that it required some legislation by Congress to relieve such structures from the imputation of being nuisances. When Congress authorized such structures and the connection of railroad tracks, then these structures, which were before illegal, became lawful. Such was the old law, the mischief and the remedy; what was unlawful at one time became "authorized" post-routes, and commercial and military highways. This was all done with the concurrence of State legislation. It was not allowable except with such concurrent consent. An act passed for the purpose of preventing monopoly, and for facilitating commerce, should not be construed to limit and restrict commerce to one particular route in opposition to others, and to their exclusion, thus creating a monopoly, the very thing intended to be prevented. I think it may be laid down as an axiom of commercial law that every port and town that seeks to become a commercial point should found its expectations entirely on its advantages and facilities. If a town is situated on the Mississippi river, and has several lines of railroad communication, running in different directions, and possesses a grain elevator that is capable of holding and storing grain until the best market can be found, and the cheapest route by which to ship, as

sworn to by Geo. G. Scott, Record, page 26, can such elevator be said to be a nuisance and unlawful structure, merely because parties can, if they choose, allow their grain to lie in store until such best market is found and the cheapest route by which to ship? But the same evidence shows that a majority of the grain went down the river; that the Illinois Central Railroad lost the opportunity of carrying it, and that the grain did not go to Chicago, but to the best market. This is an evil which plaintiffs in error seek to prevent. The grain must go to Chicago, anyhow. It is the imperative and bounden duty of the company to keep it locked up in a car, and on a continuous iron rail; otherwise it may reach the other and better market; the cheaper route may carry it, and the act of Congress will not be construed as they want it.

But it is assumed by plaintiff's counsel that the contract sued on is repugnant to the acts of Congress known as the Bridge Act, and the Act to facilitate Commerce. It can not reasonably be considered that it is so upon its face; and if so in fact, that could be shown only by proof of the certain surrounding facts which make it conflict with such acts, as before intimated in this argument. Whatever is now claimed as to its operation under alleged change of circumstances, there certainly was a time—between the date of the contract, July 22d, 1860, and the date of finishing the Dubuque Bridge, Dec. 20th, 1868,—when it was wholly lawful, and a necessity of commercial intercourse. Now, counsel claim that circumstances, such as the supposed connections of their railway tracks, afterwards combined, under the laws referred to, to render the elevator useless and the contract void, (page 17 of his argument). If in fact the Railroad Co. ever did so connect their tracks as to form a continuous line by rail to points east of Dubuque, it neither follows that "through grain" destined to St. Louis, Cairo and many other points on railroad and river might not necessarily be run through the elevator and trans-shipped on other lines, thus aiding commerce, nor that defendants ought not to recover upon the covenants of their contract. The Supreme Court of

Iowa held in this case—XXXIII Iowa, 498—"that the railroad company undertook that the plaintiffs should have the handling of all such grain, and thereby became *warrantors*," &c. And this view, which is a sound one, finds support in the case of Osborne vs. Nicholson, XIII Wallace, 658. In that case suit was brought for the price of a slave sold previous to the Emancipation Proclamation, some of the covenants of the contract being that the negro was sound in body and mind, a slave for life and that the vendor's title was good. The defense in substance was that the contract was avoided by the action of the general Government, in setting him free. The court by Justice Swayne, say at page 656, "It may safely be asserted that this contract when made could have been enforced in the courts of every State in the Union, and in the courts of every civilized country elsewhere." And again, at page 662, "But without considering at length the several assumptions of the propositions, it is sufficient answer to say that when the Thirteenth Amendment to the Constitution of the United States was adopted the rights of the plaintiff in this action had become legally and completely vested." And see at large the same case, particularly pages 662–3.

More than this: it seems but fair and exact justice in this case, even under the theory that the contract was in some part avoided by subsequent legislation and partially changed circumstances, that the railroad company should be held liable on their warranty, because in compliance with the terms of the contract the defendants in error had gone on and expended large sums in erecting buildings, &c., materially changing their condition, and because it appeared that the railroad company had in a measure forced shippers of grain to accede to such terms and to give such directions as to effectually preprevent defendants in error from receiving at their elevator any through grain whatever, no matter what point beyond Dubuque might have been its destination. That these facts did appear in the evidence, see the testimony

of Farley, Supt., page 38 of Record, at bottom, and 39, at top.

I hope the Court will not aid the plaintiffs in error in their fraudulent designs, nor establish in this case a precedent for repudiation.

PLATT SMITH.
Counsel for Defts. in Error.

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1873.

No. 234.

THE DUBUQUE & SIOUX CITY RAILROAD CO., AND THE ILLINOIS CENTRAL RAILROAD CO.,
Plaintiffs in Error,

vs.

ALFRED W. RICHMOND AND JOHN JACKSON,
Defendants in Error.

ABSTRACT OF RECORD, STATEMENT OF CASE AND ARGUMENT,

By J. M. GRIFFITH.

ATTORNEY FOR DEFENDANTS IN ERROR.

DUBUQUE:
DAILY HERALD STEAM PRINTING HOUSE.

1874.

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1873.

NO. 234.

THE DUBUQUE & SIOUX CITY RAILROAD COMPANY AND THE ILLINOIS CENTRAL RAILROAD COMPANY, PLAINTIFFS IN ERROR,

vs.

ALFRED W. RICHMOND AND JOHN JACKSON, DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

ABSTRACT OF RECORD AND STATEMENT OF CASE.

The contract sued on, (see Record pp. 3–4), was made between the Dubuque & Sioux City Railroad Company, one of the plaintiffs in error, and the Dubuque Elevator Company, to whom defendants in error are successors, on the 22d day of August, 1860. For seven years thereafter, and during all the time the D. & S. C. R. R. Co. continued in the possession and operation of its road, it faithfully observed and performed the terms of the contract. On the 1st day of October, 1867, that company leased its road to

the Illinois Central Railroad Company, the other plaintiff in error; and as one of the terms and conditions of the lease, the latter company assumed performance of the contract in question; see record, pp. 4–5. On or about the 1st of November, 1867, and within a month after it got possession of the leased road, the I. C. R. R. Co. commenced violating the terms of the contract, by refusing to permit the defendants in error to have the handling of "through grain." On the 23d day of January, 1868, defendants in error brought suit against plaintiffs in error, in the District Court of Iowa, for Dubuque County, on the law side of said court, setting up the contract in question, and the assumption of the same by the I. C. R. R. Co., alleging a violation of its terms, and claiming damages in the sum of $20,000. Record, pp. 1–5. On the same day, they filed their petition for an injunction, under Chapter 155, p. 669 of Revision of Iowa, 1860, seeking to restrain plaintiffs in error from the further violation of the terms of said contract; record, 5–6. On the 18th day of March, 1868, the D. & S. C. R. R. Co. plaintiff in error, appeared to the action at law, and filed their answer in general denial. The I. C. R. R. Co., plaintiff in error, also appeared on the same day, and filed their answer denying all and singular the matters alleged; averring that the contract sued on (and now in question) "*was made in restraint of general trade and commerce, in contravention of law and sound public policy, and creates a monopoly which is detrimental to the public interest, and hence is illegal and void;*" and averring further, "that the Dubuque & Sioux City Railroad Company had no right, power, or authority, under its charter, to enter into the contract set out in Exhibits A and B of plaintiff's petition;" record, pp. 6–7. On the 23d day of March, 1868, plaintiffs in error appeared to the petition for injunction, and filed an answer thereto, denying the matters therein alleged, and averring divers matters in defence; record, pp. 8–9.

On the issues thus raised, the action at law came on to be tried before a jury, and the proceeding for injunction

came on to be heard before the Court. In the action at law, the issues were determined in favor of the defendants in error, and a verdict rendered in their favor for dollars. The motion of plaintiffs in error, for a new trial coming on to be heard. the Court, on the 28th day of March, 1868, ordered a rebate from the verdict, and entered up judgment in favor of defendants in error, in the sum of $3446.82. At the same time the court entered a decree in the proceeding for injunction, refusing the writ, but ordering plaintiffs in error to make report to the court semi-monthly thereafter, of and concerning all the through grain; record, p. 10.

From the judgment of the District Court in the action at law, the defendants in error appealed to the Supreme Court of Iowa, assigning as error the action of the Court below in ordering a rebate from the verdict. Plaintiffs in error also appealed from the same judgment to the Supreme Court of Iowa.

The Supreme Court of Iowa, on a hearing of the appeals taken by both parties, overruled that of the plaintiffs in error, sustained that of the defendants in error, reversed the action of the Court below in ordering a rebate from the verdict, and issued its *procedendo* to the Court below, ordering judgment to be entered in favor of the defendants in error, for the full amount of the verdict rendered by the jury. Record, 19. *Richmond et al. vs. D. & S. C. R. R. Co.*, 26 Iowa, R. 191. This decision was rendered at the December Term 1868.

Subsequently, on the 8th day of June, 1869, the defendants in error commenced the present suit in equity, which is now before this court on a writ of error to the Supreme Court of Iowa. The petition in equity, as originally filed by the defendants in error, in the District Court of Iowa for Dubuque County, is found on p. 10 to 12 of Record. For this petition, the defendants in error filed a substitute on the 17th day of July, 1869, (see record, pp. 12, 13, 14 and 15), reciting the execution of the contract of 22d August, 1860, and the supplement thereto of January, 1861; reciting the proceedings in the former suit on said contract,

both of the District and Supreme Courts of Iowa, averring that "the judgment and opinion of the Supreme Court, expressly affirm said contract and supplemental contract, and the obligation of the defendants (now plaintiffs in error) to perform the same; the Supreme Court expressly holding that the plaintiffs are entitled to handle in their elevator all grain coming over defendants' railroad, whether in its own cars or those of any other connecting road, primarily shipped for points beyond, or other than Dubuque, and to have therefor the price stipulated from the defendants;" and averring that since the commencement of the former suit, the defendants (plaintiffs in error), have continued the violation of said contract and supplement; that they have failed to observe the order of the District Court to render semi-monthly reports of the through grain; and praying that an account be taken of the through grain, and that for their damages found on such accounting, and for the amount due under the *procedendo* of the Supreme Court in the former action at law, the plaintiffs have judgment; and that defendants (plaintiffs in error), be decreed specifically to perform the said contract and supplement, or in lieu thereof that they be decreed to account from time to time, during the life of said contract, of and concerning the through grain, and that plaintiffs have judgment from time to time, for the amounts found due on such accountings; and for other and further relief; record, 13 and 14.

Thereupon, on the 25th day of November, 1869, the plaintiffs in error moved the District Court to enter up final judgment on the *procedendo* of the Supreme Court in the former action at law; record, p. 15. And on the 22d day of February, 1870, the District Court entered up final judgment, in the former action at law, in the sum of 4,365.14 dollars, in favor of the now defendants in error, and against the plaintiffs in error, under the *procedendo* of the Supreme Court of Iowa; record, p. 19.

Afterwards, on the 15th day of April, 1870, the plaintiffs in error severally answered the present petition in equity of defendants in error, denying all the averments

thereof, and pleading the proceedings and final judgment in the former action at law, in bar of a further recovery; record, 17 and 18.

On the 20th day of February, 1871, such proceedings were had that a decree was entered in the District Court in favor of the defendants in error, and against plaintiffs in error, for the sum of 57,750.00 dollars, together with costs of suit, in full satisfaction for their damages from January 23d, 1868, (the date of the commencement of the former action at law, and up to which date damages had been recovered by the defendants in error, in that action), to the 1st day of May, 1870, but without prejudice to plaintiffs' claim for damages after that date; and denying their right to damages for loss of storage of grain, and their claim for interest in the assessment of damages; record, 20 and 21.

From this decree both plaintiffs and defendants in error appealed to the Supreme Court of Iowa; and such proceedings were had in said Supreme Court, that afterward on the 24th day of February, 1872, a decree was entered in said court in favor of defendants in error and against plaintiffs in error, for the sum of 73,186 dollars, together with costs of suit, without prejudice to claim for damages after May 1, 1870; and denying the claim of plaintiffs in error that the Constitution of the United States and certain Acts of Congress named, render the contract and supplemental contract sued on null and void; record 44.

The case is now before this court, on a writ of error to the Supreme Court of Iowa, wherein the defendants below are plaintiffs in error, and the plaintiffs below are defendants in error.

ARGUMENT.

The error assigned by plaintiffs in error is the denial by the Supreme Court of Iowa, of their claim that the Constitution of the United States and the act of Congress entitled "An Act to facilitate commercial, postal and mil-

itary communication among the several States," approved June 15, 1866, and the act of Congress entitled "An Act to authorize the construction of certain bridges, and to establish them as post roads," approved July 25, 1866, render the contract sued on, null and void.

I.

The Court will dismiss the writ for want of jurisdiction, because, aside from and back of the Federal question sought to be raised on argument in the State Court, the record shows that the validity of the contract sued on was res adjudicata between the parties, and that plaintiffs in error were estopped, by matter of record, to deny its validity. The decree of the State Court, so far as the validity of the contract is concerned, is based on the estoppel, and the estoppel necessarily excluded all consideration of the Federal question sought to be raised.

The record discloses that in a former action at law between the parties to this suit, the defendants in error declared on the same contract now sued on, and prayed damages against the plaintiffs in error for an alleged violation thereof; record 1-5; that plaintiffs in error appeared to the former action, and, among other things, pleaded specially therein "that the said contract mentioned in Exhibits A and B, in plaintiffs' petition, was made *in restraint of general trade and commerce, in contravention of law* and sound public policy, and * * hence is illegal and void;" record 7. The record further discloses that the issues in that action came on to be tried, and were found against the plaintiffs in error, and defendants in error took judgment in the Court below, for the sum of 3,446.82 dollars; record 10; that both parties appealed from that judgment to the Supreme Court of Iowa, and that on the *procedendo* of that Court, final judgment was entered in favor of the defendants in error, and against plaintiffs in error, in the sum of 4,365.14 dollars; record 19.

Richmond et al vs Dubuque & Sioux City R. R. Co., et al, 26 Iowa R. 191.

The record further shows that after the commencement of the present suit in equity, which was instituted on the 8th day of June, 1869, to recover damages for the continued violation of the contract, subsequent to the bringing of the action at law above referred to, (record 10-15), plaintiffs in error themselves moved the Court below to enter up final judgment in the former action at law, (record 15), to enable them to plead the judgment in bar of a further recovery on said contract in the present suit. On their motion, final judgment in the former action was entered up, on the 22d day of February, 1870, (record 19); and on the 15th day of April, 1870, they severally answered the petition in equity of the defendants in error in this suit as follows: "Third, and for a third answer to said petition, said defendant alleges that, on or about the 23d day of January, 1868, said plaintiffs commenced an action in the District Court of Dubuque County, Iowa, against said defendants, by filing a petition in said Court, in which said plaintiffs alleged a breach, on the part of said defendants, of the contracts mentioned and set forth in the petition herein, and claiming damages of said defendants for said breach, which breach by defendants, was the not performing the very same identical promises and undertakings, and each and every of them, mentioned and alleged in said petition herein; and such proceedings were thereupon had, in said action, that afterwards, at the February term, 1870, of said Court, a judgment was rendered in said action, by said Court, on the 22d day of Feburary, 1870, in favor of said plaintiffs and against said defendants, for the sum of 4,365.14 dollars, for the damages which said plaintiffs had sustained by said breach of said contracts on the part of said defendants; which said judgment still remains in full force and effect, not in the least reversed, satisfied, or made void. Wherefore said defendant prays to be hence dismissed with costs;" record 17-18.

In the above plea of a former recovery, in bar of this suit, plaintiffs in error explicitly allege of record in this

suit, that the former recovery was had against them by the defendants in error, on the identical contract "mentioned and set forth in the petition herein," and for a breach of "the very same identical promises and undertakings and each and every of them, mentioned and alleged in said petition herein." In support of their plea that the former recovery in the action at law, constituted a bar to a further recovery in this suit, plaintiffs, on the trial of this suit, introduced in evidence the record of the former action at law, claiming that it constituted a bar to a further recovery; and on their appeal of this case to the Supreme Court of Iowa, they caused the record in the action at law, to be incorporated into the record of this suit, that it might appear to that Court that the defendants in error had obtained a former recovery on the very same contract, and for a breach of "the very same identical promises and undertakings mentioned and alleged in the petition in this suit," and that such former recovery in that action constituted a bar to a further recovery in this suit. In this way and for this purpose, the record of the former action at law, came to be incorporated into the record of this suit, as it now appears in this Court.

Defendants in error, in their substituted petition in equity in this suit, (record 13), allege the former proceedings as *res judicata*, and as conclusive of their rights under the contract; and plaintiffs in error in their answers, (record 17, 18) allege them in bar of a further recovery.

The opinion of the District Court, (record, 21), shows that the main question in dispute between the parties on the trial, was whether or not the former recovery in the action at law, constituted a bar to a further recovery. It further shows inferentially, what is the fact, that on the trial, the point now made by the plaintiffs in error, that the contract is in contravention of law, and, therefore, null and void, was not raised. Indeed, it could not have been raised; for the record shows that the answers of plaintiffs in error in this suit, (record, 17, 18), contain no allegation or averment on which that point could be raised. Plain-

tiffs in error had raised that point in the former action at law, by averring specially in that case, that the contract was in restraint of general trade and commerce, in contravention of law and sound public policy, and hence illegal and void; and that issue had been determined against them, and was properly regarded by the able counsel who tried this suit for plaintiffs in error, as *res judicata* between the parties.

In the Supreme Court of Iowa, plaintiffs in error devote 22 pages of argument, as the case appears reported in 33d Iowa, R. 422, to convince that court that the former recovery had by the defendants in error, in the action at law on the same contract and for a breach of "the very same identical promises and undertakings" alleged in this suit, constituted a bar to a further recovery. Is it an open question whether or not they are estopped by the former recovery to deny the validity of the contract? The record shows that in the former action at law, defendants in error declared against plaintiffs in error on the same identical contract now sued on; that the plaintiffs in error appeared to the action, and among other things, pleaded specially *that the contract was in restraint of general trade and commerce, in contravention of law and sound public policy and hence was null and void;* it further shows that this issue, together with all others raised by the pleadings, was determined against the plaintiffs in error, and that defendants in error took final judgment in that action on the *procedendo* of the Supreme Court of Iowa, for an alleged breach of the contract; that final judgment was entered up in that action in favor of the defendants in error, on the motion of the plaintiffs in error themselves; that the plaintiffs in error then pleaded specially that judgment in bar of a further recovery on the contract in this suit, and did not again raise the question of the supposed invalidity of the contract, in their pleadings in this suit, but treated the same as *res judicata* between the parties; and that the case was tried both in the court below and in the Supreme Court of Iowa on the question, whether or not the former recovery was a bar

to a further recovery in this suit. True, in the Supreme Court of Iowa, the learned counsellor who now presents this case to this court, in behalf of the plaintiffs in error, and who made his first appearance in the case in that court, tacked on to the argument before that court as a very light tail to a kite, to lift the case into this court, the old plea, raised and decided against his clients in the former action, that the contract was in contravention of law and therefore null and void. But this cannot avail the plaintiffs in error. Aside from the fact that nothing is alleged in the pleadings in this suit, on which this question, laid to rest by final adjudication in the former action at law, could be resurrected in this case, the settled law of this court forbids it.

This court holds in common with the courts of Great Britain and of all the States of the Union, that the judgment of a court of competent jurisdiction, between the same parties, and on the same subject matter, is final and conclusive, till reversed, of the matter adjudged; and estops either party to affirm or deny in another suit or proceeding, any matter or thing contradictory thereof. And the estoppel extends not only to the matter of fact and law actually raised in the issues on which the judgment was rendered, but to every matter of fact and law that might have been but was not, presented.

In *Beloit vs. Morgan*, 7 Wallace, 619, this court held the estoppel to apply, not only in respect to the bond recovered on in a former action, but to all similar bonds of the same issue. The court say:

"On the 9th of January, 1861, the appellee recovered a judgment at law against the appellant upon another portion of these securities—though not the same with those in question in this case. The parties were identical and the title involved was the same. All the objections taken in this case might have been taken in that. The judgment of the court could have been invoked upon each of them, and if it were adverse to the appellant, he might have brought the decision here by a writ of error for review. The court had full jurisdiction over the parties

and the subject. Under such circumstances, a judgment is conclusive, not only as to the *res* of that case, *but as to all further litigation between the same parties touching the same subject-matter*, though the *res* itself may be different."

After referring to *Gardner vs. Buckbee*, 3 Cowen, 120, *Bouchaud vs. Dias*, 3 Denio, 238, *Doty vs. Brown*, 4 Comstock, 71, *Babcock vs. Camp*, 12 Ohio State, 11, with approval, the court proceed:

"Such has been the rule of the common law from an early period of its history down to the present time. But the principle reaches further. It extends not only to the questions of fact and of law, which were decided in the former suit, but also to the grounds of recovery or defence which might have been, but were not, presented."

And the court approve and quote the language of the Vice Chancellor, in *Henderson vs. Henderson*, 3d Hare, 115: "In trying this question, I believe I state the rule of the court correctly, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as a part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted a part of their case. The plea of *res judicata* applies, except in special cases, not only to the points upon which the court was required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

This court then proceed: "A party can no more split up defences than indivisible demands, and present them by piecemeal in successive suits growing out of the same transaction. The judgment at law established conclu-

sively the original validity of the securities described in the bill, and the liability of the town to pay them."

Aside from the fact that this court will not revise the judgment of a State court on a question of State law or of general jurisprudence, the fact is that there is no conflict in the authorities, either English or American, as to the principle of law affirmed by this court in *Beloit vs. Morgan*. And as is seen, the principle extends further than is necessary to be claimed by defendants in error in the case at bar. For in the case at bar, the contract sued on is the same identical contract on which the defendants in error recovered against plaintiffs in error, in the former action at law: and in the former action, the special issue was raised, whether or not the contract was in contravention of law and sound public policy, and was decided adversely to the plaintiffs in error. There was nothing in that case that prevented them from bringing it here for review before this court, had they deemed it advisable to do so.

And there is nothing in the case at bar that justifies or excuses the plaintiffs in error, in bringing this case here. There is no plea or allegation in the record of this case on which they could raise before the Supreme Court of Iowa, the question of invalidity of the contract as in contravention of law, or in respect to which they could assign error in the decision of that court, before this tribunal. For the rule of that court as of all others, in equitable proceedings, is that relief is granted only *secundum allegata et probata*. On the contrary, plaintiffs in error stood before that court, as the record shows, asserting a final adjudication of all maters between them and the defendants in error, in respect to the contract, by virtue of the former recovery had thereon against them by defendants in error. The question of invalidity was raised by the plaintiffs in error in the argument before that court, without anything in the record to justify or warrant it, in the very teeth of their special plea and elaborate argument that the former recovery was a final adjudication of all matters in dispute between the parties in respect to the contract, and was raised solely for the

purpose of enabling them to harass and delay the defendants in error, by bringing the case into this court. The question of the validity of the contract was not an open question in this suit in that court It had become *res judicata* by the decision of that court, and final judgment thereon, in the former action at law. This was well understood by plaintiffs in error; for both before that court and the court of original jurisdiction, in special plea and in elaborate argument, they stood on that decision as *res judicata*, final and conclusive between the parties, and a bar to any further recovery. And they besought those courts to decree, that defendants in error were barred from any further recovery in this suit, for the very reason that they had obtained a former recovery in the action at law, on the very same contract and "for a breach of the very same identical promises and undertakings" alleged in this suit. How then could the Supreme Court of Iowa, hold as invalid, a contract to which by their own judgment between the same parties, they had already given their sanction, and which, on an issue of invalidity raised in a former action, they had pronounced valid and binding between the parties? How could that court in view of these facts, give consideration to the question, resurrected in argument by the counsel, from the tomb where it had been laid to rest in the former action, and which was manifestly resurrected in argument in this case, solely for the purpose of obtaining two years delay by a pretence of appeal to this court? The principle reaffirmed by this court in *Beloit vs. Morgan*, *supra*, is too old and familiar to the profession, for a doubt to arise as to the object of reviving the question of the supposed invalidity of the contract, in this suit.

And it has long been the settled law of this Court that, where the judgment of the State Court rests on a principle of State law or of general jurisprudence, this Court will not take jurisdiction to revise it, even though a question legitimately arose under the 25th section of the Judiciary Act, and received a decision adverse to the right or privilege claimed.

Gelston vs. Hoyt, 3 Wheaton, 246.
Harris vs. Dennie, 3 Peters, 292, 302.
Keene vs. Clark, 10 Peters, 293.
Matheson vs. Branch Bank, 7 Howard, 260.
Crowell vs. Randall, 10 Peters, 398-9.
Bridge Proprietors vs. Hoboken Co., 1st Wallace, 141.

In *Commercial Bank vs. Buckingham's Executors*, 5 Howard, 317, the Court say, (p. 341): "It is not enough that the record shows that the plaintiff in error contended and claimed that the judgment of the (State) Court impaired the obligation of a contract, and violated the provisions of the Constitution of the United States, and that this claim was overruled by the Court; but it must appear by clear and necessary intendment, that the question *must* have been raised, and *must* have been decided *in order to induce the judgment*."

And in *Williams vs. Oliver* 12 Howard 111 the Court in dismissing the case for want of jurisdiction say: "In order to give jurisdiction to this Court to revise the judgment of a State Court, under the 25th section of the judiciary act, a question must not only exist on the record, actually or by necessary intendment, as mentioned in that section, and the decision of the Court as there stated, *but the decision must be controlling in the disposition of the case*; or in the language of some of the cases on the subject, 'the judgment of the State Court would not have been what it is, if there had not been a misconstruction of some act of Congress, or a decision against the validity, of the right, title, privilege, or exemption set up under it, 3 Peters, 292, 302, or, as stated by Mr. Justice Story, in Crowell v. Randell, 10 Peters 392, where he reviewed all the cases, it must appear 'from the facts stated by just and necessary inference, that the question was made, and that the Court below *must*, in order to have arrived at the judgment pronounced by it, have come to the very decision of that question *as indispensable to that judgment*.'" And the Court quote with approval the language used in *Commercial Bank vs. Buckingham's Executors* which we have extracted, *supra*.

In *Mills vs. Brown*, 16 Peters, 525, the Court say: "It is sufficient to say, that we have carefully examined it, (the record) and are satisfied that the points proposed to be raised here *were not necessarily involved* in the judgment given by the State Court." And for that reason the writ of error was dismissed.

In *Maxwell vs. Newbold*, 18 Howard, 511, the Court hold that where it appears by the record, that the State Court *might* have decided the case upon principles of State law independent of any provision in the Constitution or laws of the United States, and not in conflict with either, this Court will dismiss the case for want of jurisdiction.

In *Railroad Company vs. Rock*, 4 Wallace, 177, the Court hold that if it appears from the record, that the State Court *may* have decided the case on some ground other than those embraced in the 25th section of the Judiciary Act, this Court will not take jurisdiction, but will dismiss on motion

In *Rector vs. Ashley*, 6 Wallace 142, the Court say: "It is conceded that one of the points decided in the Supreme Court of the State against the plaintiff in error would be a sufficient ground for the jurisdiction, *if it were the only one on which that Court decided the case*; but it is claimed that the decree is also based on *another* and distinct ground, over which this Court has no jurisdiction, and that, therefore, we cannot examine the first point. If there *is* this second ground on which the decree may still be supported although the first were decided in favor of the plaintiff in error, it would be a useless labor to inquire into the correctness of the point which is of Federal cognizance; because, as the ruling of the State Court must be assumed to be correct on the other proposion, no reversal could follow if that proposition was sufficiently broad to sustain the decree."

In the case at bar, the validity of the contract sued on, was *res judicata*, by virtue of the decision and *procedendo* of the Supreme Court of Iowa, in the former action at law, before the commencent of this suit; and it became doubly so by the final judgment rendered on the *procedendo*, be-

fore plaintiffs in error answered in this suit. The substituted petition of defendants in error, (record, 13), alleges the grounds of *estoppel*, the proceedings by which the matter became *res judicata;* and in addition to this, plaintiffs in error in their several answers to the petition, (record, 17, 18,) set up the very matter on which the estoppel arises, and allege the proceedings in the former action at law, by which the matter became *res judicata*, in bar of a further recovery. Under this state of the pleadings, the State Court could not possibly avoid holding that the validity of the contract was *res judicata* between the parties, that plaintiffs in error were estopped to raise the question of invalidity in this suit, and that their claim, *raised only in argument* in the Supreme Court, that the contract was rendered null and void by the acts of Congress referred to, must be denied. For those acts had been passed before the matter became *res judicata* in the former action, and if they bore on the question of invalidity which was specially raised by the pleadings in that action, they should have been, if they were not, called to the attention of the Supreme Court of Iowa, when that case was before it; and on its adverse decision, plaintiffs in error should have taken their writ in that case. Having failed to do so, the State Court could not possibly avoid holding in this suit, that the validity of the contract was *res judicata*, and that plaintiffs in error were estopped to deny it.

The language of the court in *Carpenter vs Williams*, 9. Wallace, 785, is applicable to this case: "In the case before us, the rules which must determine the question at issue are common law rules, and the result cannot be varied by the application of any principle of Federal law or Federal authority."

In *Klinger vs. the State of Missouri*, 13 Wallace, 257, the court say: "Where it appears by the record that the judgment of the State court might have been based either upon a law which would raise a question of repugnancy to the constitution, laws, or treaties of the United States, or upon some other independent ground; and it appears that the court did, in fact, base its judgment on such inde-

pendent ground, and not on the law raising the Federal question, this court will not take jurisdiction of the case, even though it might think the position of the State court an unsound one. But where it does not appear on which of the two grounds the judgment was based, then, if the independent ground, on which it *might* have been based, was a good and valid one, sufficient of itself to sustain the judgment, this court will not assume jurisdiction of the case; but if such independent ground was not a good and valid one, it will be presumed that the State court based its judgment on the law raising the Federal question, and this court will then take jurisdiction."

In *West Tennessee Bank vs. Citizens' Bank*, 13 Wallace, 432, and 14 Wallace, 9, the court hold that a case is not within the 25th Section of the Judiciary Act, when the judgment below is founded on a matter which is not within the section, even though it be founded also, for an independent base, on other matter which is asserted to be within it. The court say: "The Supreme Court (of Louisiana), founded its judgment alike on the constitutional provision (of the State), and prior adjudications. * * Upon such a state of facts this court cannot take jurisdiction under the section of the Judiciary Act upon which the writ of error is founded. The motion must, therefore, be sustained, and the case dismissed."

In *Cockroft vs. Vose*, 14 Wallace, 5, it appeared that under a State statute of New York, the defendant in error, had attached a vessel for debt, and that plaintiffs in error had given bond for her release, under the provisions of the statute. The case was an action on the bond, and the judgment below being against the obligors, they brought the case into this court by writ of error, alleging that the State statute under which the vessel had been attached and the bond given, was invalid under the Constitution and laws of the United States. On motion to dismiss for want of jurisdiction, the court say:

"The suit before us was an action on a bond given by the owners of the vessel and their sureties to release her when she had been attached in the original proceeding to

enforce the lien, and several questions were raised in the defence, none of which seem, from the pleading, or anything else in the record, to have been founded on the invalidity of the statute. One of these questions evidently was whether the credit was given to the owner personally, or to the vessel; and another was whether, after the bond had been given and the vessel released, the obligors in the bond were not estopped to deny the validity of the proceeding in the attachment suit.

Now, if the Court decided the case on this latter ground, as it may have done, or on any of the other grounds except the validity of the statute, we have no jurisdiction." And the motion was sustained, and the writ of error dismissed.

In *Kennebec Railroad vs. Portland Railroad*, 14 Wallace 23, the writ of error was dismissed on motion, for the like reason assigned in *Cockroft vs. Vose, supra.*

The record shows that the judgment of the State Court not only *may* have been based on the principle of *res judicata* and estoppel, but that it *must* have been. And this principle disposed of the question sought to be raised in this Court, indeed, forbid consideration of it. This Court will not go out of the record to ascertain on what ground the State Court based its judgment, but will be content to see that a question, not of Federal cognizance, was raised by the record, on which the State Court might have based its judgment. If, however, the Court chooses to go out of the record, and take a look at the opinion of the State Court, they will find that that Court did in fact base its judgment on the principle of *res judicata* and estoppel. In delivering its opinion that Court say, (33 Iowa 498): "It is argued with great confidence, and at great length, that the contract in this case is in conflict with public policy, and therefore void. *The same objection was urged against the contract*, on the ground that it operated to create a monopoly, *when the case was before, in this Court. We held the contract valid.* 26 Iowa, 191. *The decision then made, as to the questions involved, must be considered final.*" And the above state-

ment of the Court is narrower than the facts warranted. The record shows that the former case not only put in issue the question of "monopoly", which is in fact a question of invalidity because in contravention of law and public policy, but that it was in issue, in express terms, in the former case, whether or not the contract was "in restraint of general trade and commerce, *in contravention of law* and sound public policy, and creates a monopoly which is detrimental to the public interest, hence is illegal and void." See answer of I. C. R. R. Co in the former action at law, record p. 7.

II.

The writ will be dismissed for want of jurisdiction, because the Federal question, sought to be raised in this Court, did not, and could not, arise on the record, as the record stood in the State Court.

A Federal question, not raised in the pleadings, nor shown to have arisen at the trial by the exceptions reserved, which is not german to any issue, but is wholly foreign to the case made by the pleadings and evidence, cannot be raised in argument in the State Court so as to vest this Court with jurisdiction. The Court will not take jurisdiction in such a case. The question must arise in the pleadings, either expressly or by intendment. The State Courts, in common with all other courts, must be permitted to have some rules of pleading, evidence and practice, in their efforts at the administration of justice. This privilege is essential to the administration of justice. One of the most elementary of these rules is that questions whether of fact or law, must be put in issue; and no question either of fact or law, not raised by the pleadings, either expressly or by intendment, can be tried or determined between the parties, or considered by the Court. Equally as elementary is, the rule that the evidence, on the trial, must be material to the issues.

In the case at bar no question of invalidity of contract

was raised in the pleadings. No evidence on that subject could be introduced by either party. On the contrary, by the averments of defendants in error, in their petition, and by the averments of plaintiffs in error in their answers, it appeared as matter of record, that the validity of the contract was already *res judicata* between the parties. The point raised here could not have been considered by the court of original jurisdiction, had it been raised there on the trial. When raised in argument, in the Supreme Court of Iowa, that Court could not consider it, for the very same reason that it could not have been entertained in the Court below, had it been raised there; and for the further reason that it is a settled rule of practice in that Court, to entertain no point not raised in the Court below.

In *Hoyl vs. Sheldon*, 1 Black, 518, the Court say: "All the matters put in issue by the bill and answer, and decided by the State Court, were questions which depended for their decision upon principles of law and equity, as recognized and administered in the State, and without reference to the construction or effect of any provision in the Constitution, or any Act of Congress. This Court has no appellate power over the judgment of a State Court pronounced in such a controversy, and this writ of error must, therefore, be dismissed for want of jurisdiction."

In *Lawler vs. Walker*, 14 Howard 149, the Court say that the question raised under the 25th section of the judiciary act "must appear in the pleadings of the suit, or from the evidence in the course of trial, in the instructions asked for, or from exceptions taken to the ruling of the court. It must be, that such a question *was necessarily* involved in the decision, and that the State court would not have given a judgment without deciding it;" p. 152. And referring to *The Commercial Bank vs. Buckingham's Executors*, 5 Howard 317, the court say, (p. 153): "The (State) court decided, that the bank was liable to the penalty of the act of 1824, but it erroneously supposed, because a constitutional point had been made *in the argument*, that it was one which necessarily arose from the case itself, and that it could not give a judgment in the

case upon its merits without deciding that it involved the question of a conflict with the constitution of the United States. It was in that view of the case that this court said in its opinion: 'It is not enough that the record shows that the plaintiff contended and claimed, that the judgment of the court impaired the obligation of a contract and violated the provision of the constitution of the United States, and that this claim was overruled by the court, but it must appear by clear and necessary intendment, from the record, that the question must have been raised and must have been decided *in order to induce to the judgment.*'" And the court, dismissing the case for want of jurisdiction, say, (p. 155): "If more was wanting in aid of our conclusion, it is to be found in the pleadings in the case, in the evidence given on the trial. the objections made to the admissibility of certain parts of it, in the prayers of the defendant to the court to instruct the jury, and in the charge which the court gave. *By no one of them is a constitutional question raised.* It was only suggested, *in argument*, and on that account it was, that the court certified that the 'validity of Statutes of Ohio was drawn into question, which were said to be in violation of the constitution of the United States', and not because the court considered that such a point *had been rightly raised before it*, under the 25th section of the Judiciary Act of 1789."

In *Armstrong vs. the Treasurer of Athens County*, 16 Peters, 281, the court, specifying the different methods, in one or the other of which it must appear of record, that a question under the 25th section of the judiciary act was raised in the State court, in order to give this court jurisdiction, say, (p. 286): "In the case now before us, the presiding judge of the Supreme Court of Ohio has certified on the record that the validity of a statute of the State was drawn in question, on the ground that it was repugnant to the constitution of the United States, and that the decision was in favor of the validity of said statute; and this certificate of the judge is certified by the clerk, as a part of the record. We presume that the cer-

tificate of the presiding judge was made by the authority of the court; *and as this bill and answer show that such a point might have arisen*, and this certificate on the record states that it did arise, and was decided, the case comes within the fourth clause above mentioned, and this court must take jurisdiction."

But suppose "the bill and answer" in that case, had shown, as in the case at bar, that by the most liberal intendment or construction of the matters therein alleged, the point could not properly have arisen? What then? Suppose the point raised *in argument*, under the 25th section of the judiciary act, is not material, not germane to any allegation or matter pleaded, but is entirely foreign thereto, will the court take jurisdiction, merely because counsel in violation of all known rules of pleading and practice, raise the point in argument? If this be so, what is to prevent any and every case coming to this court?

In *Armstrong vs. the Treasurer of Athens County, supra*, the fourth method mentioned by the court, in which it may appear that the question was raised in the State court, is that, "it must be entered on the record of the proceedings in the appellate court, *in cases where the record shows that such a point may have arisen and been decided*, that it was in fact raised and decided." But suppose it is a case, like the one at bar, in which the record does *not* show that such a point *may* have arisen, or rather, in which the record shows that such a point could not have been raised *secundum allegata et probata*, is it sufficient that the point was raised in argument, without anything in the record to justify it?

Smith vs. Hunter, 7 Howard 738, was a case in which it was claimed by plaintiff in error that the State court had sustained a State statute in violation of the provision of the Constitution of the United States, which prohibits the passing of laws by the States impairing the obligation of contracts. Discussing the question of jurisdiction, the court say, (p. 742): "The pleadings in this case nowhere allege any right, title or interest derived from or

under any authority of the United States, nor the violation of any right, title, or interest so derived, nor any violation of the Constitution, nor of any right guaranteed thereby Nothing of this kind is apparent either on the face of the decree of the Court of Common Pleas, or of that of the Supreme Court of Ohio," and after reviewing the adjudged cases on the question of jurisdiction, the court dismissed the cause for want of jurisdiction, on the ground above stated.

In *Railroad Company vs. Rock*, 4 Wallace 177, the court put the question at rest in the following pointed language: "After a very careful examination of the record of the case, we are unable to discover that either the validity of the Constitution of the State of Iowa, or the clauses of the Constitution of the United States mentioned in the certificate, are involved in that record, or were decided by the court. It is probable that counsel, in the argument of the case in the Supreme Court of Iowa, insisted that these matters were involved, and that the Chief Justice felt bound to certify when requested, that they were drawn in question. But if the record does not show that they were *necessarily* drawn in question, this court cannot take jurisdiction to reverse the decision of the highest court of a State, upon the ground that counsel brought them in question in argument." And the writ of error was dismissed on motion for want of jurisdiction.

The language of the court in the above case is quoted with approval in *Parmelee vs. Lawrence*, 11 Wallace 36. And the court further say, speaking of a question raised under the 25th section of the judiciary act: "It must appear in the pleadings of the suit, or from the evidence in the course of the trial, in the instructions asked for, or from exceptions taken to the rulings of the court. It must be that such a question was *necessarily* involved in the decision, and that the State court would not have given a judgment without deciding it." Then, after quoting the language of the court in *Railroad Company vs. Rock*, which we have extracted above, the court say: "We will add, if this court should entertain jurisdiction upon a cer-

tificate alone in the absence of any evidence of the question in the record, then the Supreme Court of the State can give the jurisdiction in every case where the question is made by counsel in the argument. The office of the certificate, as it respects the Federal question, is to make more certain and specific what is too general and indefinite in the record, but is incompetent to originate the question within the true construction of the 25th section. Motion to dismiss granted."

In *Steines vs. Franklin County*, 14 Wallace, 15, the court say, (p. 19):

"Argument to show that the case as exhibited in the pleadings does not present any question cognizable in this court under a writ of error to a State court is hardly necessary, as neither the bill of complaint nor the answer contains any averment which would warrant such a conclusion or which has any tendency to support such a theory. * * * Clearly the pleadings do not present a case where is drawn in question the validity of, or an authority 'exercised under the United States'; or where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of its being repugnant to the Constitution, treaties or laws of the United States; or where any title, right, privilege, or immunity is claimed under the Constitution or any treaty or statute of or commission, held or authority exercised under the United States; or where is drawn in question the construction of the Constitution, or of a treaty, or statute of, or commission held under, the United States, as the language is in the corresponding provision of the Judiciary Act. Cases not falling within one or the other of the three classes of cases mentioned are not re-examinable in this court under a writ of error to a State court, as the court possesses no other appellate jurisdiction in such cases than that conferred by those provisions. Apply that rule to the present case and it is as clear as anything in legal investigation can be that the pleadings in the case do not present any question re-examinable in this court under a writ of error to a State court.

"Final judgments and decrees only of a State court are re-examinable in this court, *and before the court can entertain jurisdiction to re-examine such a judgment or decree, it must appear, either by express averment in the pleadings or by clear and necessary intendment*, that some one of the questions mentioned in the 25th section of the Judiciary Act was raised in the State court, and that it was there decided in the manner therein required to give this court such appellate jurisdiction, or that the State court could not have reached the conclusion it did without deciding the question, and in the manner required by those provisions to give this court jurisdiction in the case."

In *Caperton vs. Bower*, 14 Wallace, 216, the court hold, (see p. 234) that the certificate of the presiding justice of the State court appended to the judgment of that court, is insufficient to show that a question of Federal jurisdiction under the 25th section of the Judiciary Act was raised, unless it also appears that such question properly arose on the pleadings and record of the case in that court. "Undoubtedly such a certificate is entitled to much weight, as showing that the question was decided by the court which gives it, and in the manner required to give jurisdiction, but it is not conclusive to show that the question was raised in the case, *as the latter question may depend upon the construction of the pleadings*, or as in this case, upon the proper construction of the language of the bill of exceptions."

III.

This Court will not entertain a point of error assigned at large, on the body of the Constitution.

A writ of error does not lie to a State Court on the ground of an alleged violation of the Constitution, unless it appear *by the record* that the point was raised in the State Court; that the plaintiff in error called attention *to the particular clause* of the Constitution relied on, and to

the right claimed under it; and that the question thus distinctly raised, was ruled against him.

Farney vs. Towle, 1 Black. 350.
Hoyt vs. Sheldon, Ibid. 518.
Maxwell vs. Newbold, 18 Howard, 511.

IV.

Supposing, for the sake of argument, that the contract sued on is in contravention of law and public policy, the Acts of Congress mentioned in the assignment of errors, give no right to protection from the consequences of a contract made in violation thereof.

The contract sued on was assumed by the I. C. R. R. Co. plaintiff in error, on Sept. 13, 1867. The assumption inured to the benefit of defendants in error, to the same effect as if the contract had been made that day, between them and the R. R. Company. The Acts of Congress had already been passed, the one on June 15, 1866, and the other on July 25, 1866. The right to be relieved from the consequences of a contract made in violation of law or public policy, is not one of the rights given either by the Judiciary Act or by the Acts of Congress referred to. This Court will not take jurisdiction in such a case.

In *Walworth vs. Kneeland*, 15 Howard 351, the State Court had decreed specific performance of a contract alleged by plaintiff in error, to have been entered into in violation and in fraud of an Act of Congress. The Court say, (p. 353): "If the State Court had committed so gross an error as to say that a contract, forbidden by an Act of Congress, or against its policy, was not fraudulent and void, and that it might be enforced in a Court of Justice, it would not follow that this writ of error could be maintained. In order to bring himself within the 25th section of the Act of 1789, he (plaintiff in error), must show that he claimed some right, some interest, which the law recognizes and protects, and which was denied to him in the State Court. But this Act of Congress certainly gives

him no right to protection from the consequences of a contract made in violation of law. Such a contract, it is true, would not be enforced against him in a Court of Justice; not on account of his own rights or merits, but from the want of merits and good conscience in the party asking the aid of the Court. But to support this writ of error, he must claim a right which, if well founded, he would be able to assert in a Court of Justice, upon its own merits, and by its own strength. No such right is claimed in the answer of the plaintiff in error. And, indeed, it would be a novelty in legislation and in public policy if Congress had taken so much pains to provide for the protection of persons who had combined with others to perpetrate a fraud on the United States, and found themselves in the end, the sufferers by the speculation; or who, by the error of a State Court, had been compelled to share its gains with their associates in fraud. The right or interest claimed in the State Court must be of a very different character, to entitle him to the protection of the Act of 1789. It has already been so decided in this Court, in the case of Udell and others vs. Davidson, 7 Howard 769." And the writ was dismissed for want of jurisdiction.

V.

Plaintiffs in error do not show themselves to be within the purview of, or entitled to the privilege conferred by, the Acts of Congress mentioned in the assignment of errors.

The Act of June 15, 1866, provides "that every railroad company in the United States, *whose road is operated by steam*, * * is authorized * * to connect with roads of other States, so as to form continuous lines," etc. It is only companies *whose roads are operated by steam* that are privileged to connect. Whether the Act applies to a given case or not, is a mixed question of law and fact. Whether the roads of plaintiffs in error are operated by steam or not, or whether they were so operated at the time of the breach of the contract, is a question of fact.

This question of fact would have to be determined by evidence on a trial. Before evidence could be introduced on the point, the rules of pleading and practice require that the fact should be alleged in the pleadings and put in issue. No such fact is alleged or put in issue, no evidence on the point was or could have been introduced under the pleadings at the trial, no such question was tried, no such fact was found. The fact may or may not have existed at the time of the alleged breach. The one road may not have been allowed by local law, to use steam within the limits of the town of Dunleith, and the other may not have been allowed to use it within the limits of the city of Dubuque. Whether operated by horse power, steam power, or some other power, does not appear and could not be made to appear under the issues of this case. Whatever may have been the fact, the Supreme Court of Iowa could not take judicial notice of it, nor can this Court. Even if this Court could do so, and the former not, it would not reverse the judgment of the State Court on that ground. For the question is, did the State Court err in denying the claim of plaintiffs in error? If it could not take judicial notice of the fact, and for that reason had to deny the claim, it committed no error; and this Court will not assume a fact which was not in evidence or made to appear in that Court, for the purpose of reversing the judgment of that Court, which is admitted to have been correct on the law and facts before it.

Even supposing it possible, as within the limits of human reason, that this Court or any Court, or that even a rural justice of the peace, could hold that the Acts of Congress referred to, approach in the remotest degree to a nullification of the contract sued on, in any contingency, surely plaintiffs in error would first have to show in a proper case made, that they are or were within the scope and terms of the Acts.

Again. The Federal question sought to be raised, is based on the admission that the contract was valid when made, but subsequently became invalid, null and void, under the Acts referred to, when plaintiffs in error are

supposed to have connected their roads at Dubuque, so as to form continuous lines. Unless a connection of the two roads was made so as to form continuous lines, it is not claimed that the contract became annulled by the Acts. Here is another question of fact, on the determination of which depends the applicability of the Acts to the contract. Was this fact to be assumed by the State court? Before plaintiffs in error can claim that the Acts apply to the contract, to affect it in any respect, must they not on their own theory, show the existence of this fact? Can they show it without evidence? Or would evidence of that fact even if found in the record, be regarded as material to the case, in the absence of any allegation in the pleadings putting such fact in issue? The rule of the courts of Iowa, of this court, and of all courts, in equity, is that the decree must go *secundum allegata et probata*. It will not do that the thing is alleged, but not proved; nor will it do that it is shown, but not alleged. In the latter case it is but an *ex parte* showing, wholly immaterial, which the opposing party is not called on to disprove or controvert, which he may cause to be stricken out, on motion to exclude, or which he may disregard as immaterial to the case. This fact, on the finding of which by the court, confessedly depends the applicability of the Acts to the contract, is neither alleged in the pleadings, or in the remotest degree referred to, nor is it shown in the evidence.

VI.

The Acts of Congress can afford no protection, because the record shows that the breach of contract for which damages are awarded in this suit, occurred before plaintiffs in error availed themselves of the privilege conferred by the Acts, if they ever have so availed themselves.

As we have said under the 5th point above, plaintiffs in error do not and cannot claim that the Acts of Congress, *per se*, annul the contract in question. But they claim that when they, under the provisions of those Acts, con-

nected their roads so as to form continuous lines, (if they ever did so), then the acts operated to annul the contract, and discharged them from the obligations thereof.

The substituted petition of defendants in error, (record 13), and the testimony of Blake, (record 34–37), and of Farley, (record 37–40), show that the breach of contract commenced on the 1st of November, 1867. On the 23d of January, 1868, defendants in error instituted their former action at law, alleging the breach; and in that action they recovered the damages they had sustained up to the day of the commencement of that action.

Having established, by the proceedings in that action, the validity of the contract and a right to recover damages for the breach thereof, they then instituted this suit, alleging that since the commencement of the former action, the plaintiffs in error had continued to violate the contract, and claiming damages for such continued violation, from and after the 23d day of January, 1868, the day of the commencement of the former action, and up to which day they had already recovered their damages in that action. And while the evidence in this suit shows that the breach of contract commenced as early as November 1, 1867, (record 34–40), and was continued and persisted in by plaintiffs in error, notwithstanding the proceedings in the former action at law, the same evidence shows, (see testimony of Farley, record 37), that the bridge over the Mississippi river was not completed till sometime in December, 1868. Whether plaintiffs in error have ever connected their roads so as to form continuous lines or not does not appear, but the evidence does show that up to this time, no such connection could have been made or was possible; for till the month of December, 1868, the bridge had not been completed. Yet plaintiffs in error are shown to have been in open and flagrant violation of the contract as early as November 1, 1867, more than a year before the completion of the bridge, and have since so continued, in defiance of the judiciary of the State. And in the decree of the State court, defendants in error are awarded damages for the continued violation of the contract, from the

23d day of January, 1868, a date nearly one year anterior to any possible connection of the two roads. It is manifest from these facts that plaintiffs in error, or rather the Illinois Central R. R. Co., in violating the contract, were not acting from any motive of obedience to law or the Acts of Congress, but in a spirit of bold and defiant disregard of law and plighted faith.

VII.

The Acts of Congress do not annul or render void the contract sued on.

We do not propose to discuss this point at any great length. We do not think it admits of much discussion; and we are very strongly of opinion that none is necessary.

The claim made in argument by plaintiffs in error in the State court, as appears by the certifying clause of the decree, was that the Acts of Congress therein mentioned, render the contract sued on null and void. This was the only claim made, and is the only one that can be noticed in this court. The concluding sentence of the certifying clause, wherein the court is made to say: "And it is adjudged that said Constitution and said Acts of Congress do not, in any manner affect the validity or force and effect of either or any of said covenants, or of either of said contracts," means nothing. And the 1st, 2d and 3d errors assigned in like language, by plaintiffs in error, (argument, p. 7), mean nothing. It is not enough that plaintiffs in error claimed in the State court that the Acts of Congress *in some manner affected the validity of the contract*, nor that the State court adjudged that said Acts "do not in any manner affect the validity, or force and effect of the contract." Such a claim and denial was not the claim and denial of a right or privilege, entitling them to the review of this court under the 25th section of the Judiciary Act. To entitle them to the review of this court, they must have claimed a distinct and specific right or privilege under the Acts, and have met with a denial. The only

right they claimed, which this court can notice, is that the contract sued on should be held null and void under the Acts of Congress mentioned. The 4th error assigned covers this claim, and is the only one assigned which this court will notice.

The only question, then, is, do the Acts of Congress referred to, render the contract sued on null and void?

1st. They do not *per se*. This is manifest.

2nd. They do not, in any contingency of fact, established by the proof on any issue in this suit. Preliminary to their having any such effect, confessedly plaintiffs in error would have to establish the facts that their roads were "operated by steam," and were connected "so as to form continuous lines," neither of which facts are alleged, or in issue in this suit.

3d. The clause of the Constitution conferring on Congress the power "to regulate commerce with foreign nations and among the States," had for its object the prevention of State legislation inimical to inter-State commerce, and not the abrogation of contracts between citizens. No one will deny that inimical State legislation was the evil anticipated and avoided by this clause. And no one will assert that the abrogation of private contracts between citizens was its object, or within the scope of the power intended to be conferred.

4th. If, under that clause of the Constitution, Congress has the power to legislate in abrogation of private contracts between citizens, it has not done so, in the Acts referred to.

5th. The inviolability or protection of private contracts between the citizens, from ruthless legislation, is so high and sacred a trust of the judiciary, reaching to the base of society and of all trade and commerce among men, that this Court will not construe a statute as in abrogation of a private contract, unless the plain language and clear intent of the Legislature compel such a construction.

6th. The Act of Congress of June 15, 1866, confers a privilege, imposes no legal duty. It enlarges rights, creates no legal obligation. It is permissive, not coercive or

mandatory. The legal meaning of the word "authorize" when applied to a private citizen, is very different from its meaning when applied to an officer of the government or one holding official relation thereto. Every lawyer understands this. Every male citizen of the age of twenty-one years, not otherwise disqualified, may be "authorized" to vote; but no Court would hold, no justice of the peace, excepting Dogberry, perhaps, would decide, that because "authorized" or privileged to vote, he was therefore compelled by law to vote. A hundred rights and privileges are enjoyed by the private citizen, under and "authorized" by, the common and statute law of the land, the exercise of which is wholly discretionary on the part of the citizen. If the Act is mandatory, then every railroad company in one State, that can connect their road with that of another company in another State, is under legal obligation to do so, and has no discretion, whether it is wise or unwise, profitable or ruinous both to themselves and the business public. A road in one State may have its terminus at a point on the State line, where three other roads in the adjoining State converge; and the competition thereby created may be very advantageous to the commercial interests of both States. But if the learned counsel for plaintiffs in error be correct, in his meaning of the word "authorized" as used in the Act referred to, the former company would be under legal obligation to connect their road with one of the three, so as to form a continuous line, and thereby destroy all competition between the three roads for the carrying trade of their road, and lose all the commercial benefit derived from such competition. If this result be one of the fruits of Congress undertaking to legislate on the subject of commerce between the States, they had better stop legislating. There is now another Iowa road besides the D. & S. C. R. R., having a terminus at Dubuque. It can connect at Dubuque with the I. C. R. R. which is an Illinois road. Instead however of doing so, it connects with still another Iowa road at Dubuque, which runs down the Mississippi river, crossing several roads running to Chicago and other markets, and thereby competi-

tion, which is said to be the life of trade, is created. Now if the learned counsel for plaintiff in error be correct, in his construction of the Act of Congress, this competition is in violation of law and that other Iowa road is under legal obligation to stop it and to connect at Dubuque with the I. C. R. R. so as to form a continuous line and give the latter a monopoly of the carrying trade. Opposite Clinton, Davenport and Burlington—Iowa towns on the west bank of the Mississippi river—several Illinois roads converge, competing for the carrying trade of the Iowa roads having termini at those places. These Illinois roads thus converging at the points opposite those towns, run eastwardly, southeastwardly and northeastwardly in different directions and to different markets, thus giving the people of Iowa, not only the benefit of competition between those roads, but a choice of markets. There is a railroad bridge across the Mississippi river at each of those towns, and the Iowa roads there terminating, can make connection with any one of the Illinois roads converging there, and thus form a continuous line; but to do so would destroy competition, deprive the people of a choice of markets, and would enable the one Illinois road connected with, to monopolize the carrying trade of the Iowa road. According to the theory of the counsel for plaintiff in error, the Iowa road is required by this Act of Congress to make this connection, however injurious to itself and the people along the line of its road. Besides this, the Mississippi is a navigable river, and at each of these towns, boats and steamers from Pittsburgh, Cincinnati, Louisville, St. Louis, Memphis and New Orleans, compete with the railroads and with each other for the commerce of Iowa. The same is true of Dubuque. Now, according to the theory of the learned counsel for plaintiffs in error, this free competition of steamboats and railroads for the commerce of the Mississippi valley is all illegal and must be stopped According to his notion, it is prohibited by the Act of Congress. Every road having a terminus on the west bank of the Mississippi river,

having the means by bridge, of connecting with a road on the other side, is required and commanded by Act of Congress to do so, in order to form a continuous line. All competition at the Mississippi river between steamboats with each other, and between railroads with each other, and between steamboats and railroads is illegal and void; one continuous line of railroad *must* be made, and it *must* be given a monopoly of the carrying trade, and all freight *must* go through to Chicago, towards the eastern seaboard without stopping. Congress he thinks has made a strait jacket for the commerce of the west, and it must be put on and worn, however tight it may be. Though it may cramp the victim, compress the lungs, stifle the breath and kill the patient in the end, yet it must be put on *nolens volens*, for otherwise his client, the Illinois Central R. R. Co., cannot escape the consequences of violating their contract with these defendants in error. This in a nut shell is the theory of the learned counsel. It is regulating commerce with a vengeance We think the remedy worse than the disease. It is to kill the patient by pretending to administer to his relief. If Congress under the advice of the counsellor, cannot do better than this, towards regulating commerce. it had better stop regulating, and the sooner the better for the country.

But the fact is, Congress has done no such foolish thing. It is only in the imagination or disordered fancy of the counsellor, that this thing has been done. Congress in the act referred to, did not, and did not intend to come down and tell men how they shall transact their business; that they must do it in this way and not in that; that they must shovel grain out of cars with a spade, as our friend Farley did, (under the Act of Congress of course!), rather than permit it to go through the elevator; that commerce must go in this channel and not in that; that a railroad in one State *must* be connected with one in another State; that continuous lines *must* be made, and that monopolies *must* be created; that freight *must* go through to Chicago, and not be allowed to stop at the Mississippi river where other markets can compete for it. Congress is unfit and

incompetent for the task of regulating and directing how men shall transact their business, how trade shall be done, and how commerce shall be carried on. And it has attempted to do no such thing in the act referred to. It has not the constitutional right to do so. It has no more right to say to a railroad company that it *must* connect its road with that of another company, so as to form a continuous line, than this Honorable court has. Neither has it the constitutional right in regulating commerce among the States, to absolve men from their lawful contracts and business engagements. To do so is neither essential, nor german to the exercise of the power to regulate commerce among the States. The power was given that Congress might protect commerce from inimical State legislation, and preserve it free among the people of the States, not trammel it with restrictions or coerce it into unwilling channels.

The idea of the counsel of plaintiffs in error, that Congress has adopted a commercial policy of through transit for the products of the West, on continuous lines of railroad eastwardly to Chicago and the Atlantic seaboard, and that all private contracts between citizens in the transaction of their business, which are not in accord with this supposed policy, are null and void, exists only in the fancy of the counsel. The Act of Congress referred to, applies to railroads running north and south as well as east and west; and Congress has no more adopted a commercial policy, even if it could do so, that the products of the West shall be carried eastwardly to the seaboard, than it has that they shall be carried southwardly on the greatest highway which nature ever gave to a people.

VIII.

The claim of plaintiffs in error is grossly unjust.

When the contract sued on was entered into in 1860, the D. & S. C. R. R. Co. had constructed their road but about one hundred miles westwardly from Dubuque. All their

resources were needed in the further extension of the road. At Dubuque, the eastern terminus, they had neither elevator nor warehouse for the storage of grain. They had to unload their cars of grain on arrival at Dubuque, by a resort to the slow, expensive, and primitive method of shovelling and sacking by hand The grain then had to be hauled by teams to the ferry boat for transit across the river, or to the boats and steamers lying at the wharf, for shipment to the great markets of Cincinnati, St. Louis and New Orleans, or it had to lie in cars for want of warehouse in which to store it. The company were too poor to build an elevator, by means of which, as many cars could be emptied in a moment, as in a day by shovel, by means of which the grain could be spouted into barges for transit across the river, and into barges and steamboats for shipment to Cincinnati, St. Louis, New Orleans and foreign ports, or by means of which the grain could be held in store for a future market. While the railroad company were too poor to build an elevator themselves, others were deterred from investing in such an enterprise, for the reason that it was apparent, that it would not pay an interest on the investment for years to come, and that its value lay entirely in the future. Under these circumstances the railroad company applied to certain capitalists in New York, and to induce them to invest in the erection of an elevator at Dubuque, offered them a contract for fifteen years on the terms set out in the contract sued on. As a consequence of this offer, the contract sued on was made and the elevator built. But it did not pay, and could not be expected to pay for years to come. Hope deferred made sick the heart of those who had put their money into the enterprise, and they applied to Dean Richmond of New York to relieve them by purchase of the unprofitable investment With his accustomed sagacity and unerring judgment, he saw that while the enterprise might prove a losing business during the first half of the period the contract ran, it would be profitable during the latter years. He made the purchase, and the present defendants in error became his successors. Scarce-

ly half the period of the contract had run, when in October, 1867, the Illinois Central railroad company got possession of the road of the D. & S. C. R. R. Co. by lease, on the express condition, honorably insisted on by the latter Company, that the former should assume and perform the elevator contract But with the perfidy and defiant disregard of law and justice that has characterized that Company for years past, hardly had it obtained possession of the road under the lease, before it commenced violating the contract it had solemnly engaged to assume and perform; and in a short time, threw off all disguise and defiantly repudiated its obligation altogether. Aside from the contract, the large amount invested in the erection of the elevator is a total loss, to say nothing of the losses incurred in operating it the first seven years of the contract. For it is situated below the city, outside the range of business, on the bank of the Mississippi river, immediately adjoining and surrounded on the land side by the buidings of the freight depot of the railroad, and can be used for no purpose but an elevator in connection with that road.

The object of the I. C. R. R. Co. in repudiating the contract, was to destroy the competition offered at Dubuque by the river navigation and to force all grain through to Chicago on their road, and thereby secure to themselves the profit of the long haul. For by means of the elevator, the city of Dubuque had become an important grain market. The grain stopped there, stored in elevator, and was thence distributed to all competing markets—by rail to Chicago, and by barge and steamer to the markets down the river—to New Orleans and foreign ports. To break up this competition, to destroy the market of Dubuque, to force all grain through to Chicago and thereby gain the long haul, the elevator contract was repudiated and cars were furnished along the line of the road west of Dubuque, only for such grain as the shippers would consent to send through to Chicago.

Such are the facts and circumstances under which both the plaintiffs nominally, but only the I. C. R. R. Co.

really, ask this court to hold them discharged from the obligations of the contract.

This argument would not be complete without quoting the language of the Supreme Court of Iowa, in which they dispose of the claim made by plaintiffs in error:

"It is claimed that the object of these acts are to secure to travel and freight going from State to State, through lines of transportation without change of cars. We are prepared to assent to this statement of the object of this congressional legislation. We fail, however, to find in these acts any provisions requiring railroads to connect so as to form such continuous lines, or requiring the cars of one to be hauled over the roads of another. Without expressing any opinion upon the authority of Congress so to legislate, it is very plain that these statutes have not that effect. They simply authorize the railroad corporations so to conduct their business, and thereby exempt such a course from local interference or prohibition, on the part of State or municipal legislation. They do not command connection by railroads; they simply permit it. It cannot be claimed that, under these laws, the Dubuque & Sioux City Railroad and The Illinois Central, without the mutual consent of the respective corporations, would constitute a continuous through line, which could be used by either company. If no contract existed between these corporations, the public would receive no benefit, in the way of continuous transportation, from these laws. Again while the law of Congress authorizes the erection of the Dubuque bridge, and declares it shall be used by the trains of all railroads, for a reasonable compensation, it does not compel the railroads to use it. If the railroad corporations that are defendants to this suit should, to-day, determine to return to the use of ferry boats or plaintiffs' elevator, in case no contract with the railroad bridge company is in the way, the Acts of Congress would not prevent it. They do not, as before remarked, require rail-

roads to be operated as continuous lines—they simply permit it, and protect them when that course is voluntarily adopted. Suppose the elevator, to day, should offer inducements, at the expense of shippers, and to the advantage of the railroad companies, for the transportation of the "through grain" across the river, and the offer should be accepted, what relief would shippers have, or how could they, under these congressional laws, defeat the arrangement? It may at once be seen that the contract involved in this suit is not in conflict with these laws.

"That the public commercial policy of the country favors continuous transportation may be conceded. But that policy is enforced by no laws, either of legislative enactments or judicial recognition. Contracts in contravention of a general policy of this character are not invalid. These remarks will be understood as applying to roads in different States, and not to the roads of this State."

In conclusion we again say that the taking of this writ of error is without excuse or apology, and was taken only for vexation and delay. Plaintiffs in error are wealthy and powerful corporations, the defendants are private citizens. The matter estopping plaintiffs in error from raising the question here asserted, was specially pleaded by both parties with different objects in the court of original jurisdiction, and about it, and its effect, there could be no possible misapprehension on the part of counsel Besides, there is nothing in the record on which the question could be raised. And the application of the Acts of Congress to the contract, if at all applicable under any state of facts, so manifestly depended on facts not put in issue or shown in this case, that misapprehension on the part of the counsel taking the writ was impossible. It was manifestly for vexation and delay, and we respectfully submit that the writ should be dismissed with damages as provided in the twenty-third rule.

The case is fully within the language of the court in *Pennywit vs. Eaton*, 15 Wallace, 382: "There can have been no good ground for the writ of error under the for-

mer adjudications of this court, and there is no attempt to question these adjudications. We are obliged, therefore, to regard this writ of error as prosecuted for delay." And the Court affirmed the judgment below, with ten per cent. damages.

J. M. GRIFFITH,
of Counsel for defendants in Error.

See Supplement to Argument next page

SUPREME COURT

OF THE

UNITED STATES,

OCTOBER TERM, 1873.

No. 234.

THE DUBUQUE & SIOUX CITY RAILROAD COMPANY AND THE ILLINOIS CENTRAL RAILROAD COMPANY, PLAINTIFFS IN ERROR,

vs.

ALFRED W. RICHMOND AND JOHN JACKSON, DEFENDANTS IN ERROR.

SUPPLEMENT TO ARGUMENT OF DEFENDANTS IN ERROR.

The learned counsel for Plaintiffs in Error, in his reply, seeks to parry the force of the 1st point made in our argument, by feigning surprise at the idea that the action at law commenced January 23, 1868, is not one and the same with the suit in Equity now before this Court, and which was commenced on the 8th of June, 1869. That the former action at law and the present suit in Equity, are two separate and distinct judicial proceedings, does not admit of doubt. Whether we consider the pleadings and the judicial procedure in the two cases with reference

to the order of time in which they occurred, or with reference to the subject-matter and *gravamen* of the two suits, it is equally apparent, that they are separate and distinct. The former action at law counted on a breach of the contract, prior to the 23rd day of January, 1868, and claimed damages that had resulted to Defendants in Error, prior to that date. It was commenced on the 23rd day of January, 1868, on the law side of the Court. Record, p. 1-5. The petition which was filed the same day, Record 5, for an injunction against future breaches, while auxiliary to the action at law, under the statute of Iowa, constituted no part of, or element in the action. The action at law came on to be tried before the Court and a jury on the issues therein raised, on the 28th day of March, 1868, Record 10, and the issues raised, (one of which, was that the contract was in contravention of law, null and void.) Record 6-7, were decided against plaintiffs in Error. The case then went by appeal to the Supreme Court of the State, and was finally passed on by that Court, and the *procedendo* of that Court was issued to the Court below, ordering final judgment to be entered in favor of Defendants in Error, in accordance with the opinion of that Court, before the present suit in Equity was instituted.

The present suit in equity was not commenced till the 8th day of June, 1869, Record 10, bottom. That the action at law had been finally disposed of by the Supreme Court of the State, and that the *procedendo* of that Court had issued before the commencement of the present suit in Equity, appears by the record entry on p. 19 of Record, bottom, wherein it is recited that "this cause now coming on to be heard on the *procedendo* from the Supreme Court, and on the motion of defendants that judgment be entered in accordance with the opinion of the Supreme Court, and on the motion of defendants to dismiss the supplemental *petitions filed by Plaintiffs since the return of the cause from the Supreme Court*, * * the Court doth consider and adjudge," etc.

When this equity suit was commenced, then, the action at law and all issues raised in it, had been tried and determined not only in the Court of original jurisdiction, but by the Supreme Court of the State, and its *fiat* has issued to the Court below, to enter up judgment in favor of Defendants in error and against Plaintiffs in error, on all the issues raised in that action—the most material one of which was whether the contract was or was not "in contravention of law, null and void."

Again, the substituted petition in equity, Record 12, bottom, to 15, states a cause of action separate and distinct from that of the action at law. True the contract alleged is the same in both. But while in the action at law, Defendants in error, had counted on a breach prior to the 23d of January, 1868, and for damages that had been sustained prior to that day, in their suit in equity, commenced the 8th of June, 1869, they allege breaches that had occurred since the commencement of the action at law, and prayed relief in damages that had accrued since the commencement of that action, and for relief in specific performance, etc.

The learned counsel says we called our petition in equity a "supplemental petition." Suppose we did? That cannot make two suits, one and the same, which are in their very nature, character, form and substance, separate, distinct and different. But the record shows that after Plaintiffs in error interposed the objections found on p. 12, of Record, to our supplemental petition, we dropped it altogether, and filed our substituted petition, found in Record, p. 12, bottom, to 15.

But a conclusive answer to the learned counsel is found in the fact, that before Plaintiffs in error, answered to the petition in equity, they procured the Court to enter up final judgment against them on all the issues raised in the action at law, under the *procedendo* of the Supreme Court of the State, and then pleaded that judgment as a bar to a further recovery in this suit. The separate answers of the Plaintiffs in error to the substituted petition in equity, are found on p. 17 and 18 of Record; and how the learned counsel can read those answers and yet seriously claim that this suit in equity is one and the same case with the action at law, we cannot understand. Be this as it may, that judgment was final & conclusive between the parties. No appeal was taken from it, & this writ of error does not seek to reach it. It stands final between the parties & conclusively

In the action at law an issue was raised on the validity of the contract, and under that issue, Plaintiffs in Error could have referred to the clause of the Constitution, and to the Acts of Congress, from which they now seek immunity for the violation of their contract. And when that issue was determined against them by the entry of final judgment, under the *procedendo* of the Supreme Court of the State, they should then have resorted to the writ of error, in that case, if they desired the supervisory jurisdiction of this Court. Having failed to take their writ in that case, in which the validity of the contract was expressly put in

Pltffs in error to again impeach the validity of the contract

issue, they are now estopped by the final judgment rendered on that issue in that case.

The learned counsel seems to have a difficulty in understanding the difference between a plea of invalidity of contract and a plea specially averring the Constitution and Acts of Congress. We do not claim that the Constitution and Acts of Congress should be specially pleaded; but we say that to enable the counsel to refer to them in argument, and to claim under them that the contract sued on is null and void, there must be some plea or allegation of the invalidity of contract, either expressly or by intendment, to raise an issue on the validity of the contract.

The learned counsel concludes that because the Supreme Court of the State extended towards him the courtesy of hearing his claim under the Acts of Congress referred to, and disposed of it with the politeness to counsel that uniformly characterizes that Court, therefore the Court could not have based its judgment on the principle of *res judicata*. Had the same claim been made before that Court, by counsel less distinguished than the learned counsellor who presented it, we doubt not the Court would have courteously noticed it in their opinion, however foreign to the case they may have considered it. And as to the certifying clause of the decree in which the claim is stated and denied, it is enough to say, that without it the Plaintiffs in Error would not have had a semblance of claim to the jurisdiction of this Court, and that it was inserted by the Court at the request of, and as an act of courtesy toward the counsel. That the principle of *res judicata* is stamped all over the case, can admit of no doubt. It is alleged by Defendants in Error, in their substituted petition, Record, 13, and it is with equal emphasis averred by the Plaintiffs in Error, in their several answers, Record, 17–18. And the learned counsel reciprocates but slightly the indulgence of the Court below, when he pays them the very doubtful compliment of suggesting that they saw no such principle in the Record.

J. M. GRIFFITH,
Of Counsel for Defendants in Error.